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No.

In the Supreme Court of the United States

CAROLYN C. BARR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 26 U.S.C. § 7403, a district court may order the sale of a delinquent taxpayer's property to satisfy a federal tax lien, even if the property is co-owned with another individual who does not owe taxes. Sale proceeds are to be divided "according to the findings of the court in respect to the interests of the parties and of the United States." *United States* v. *Craft*, 535 U.S. 274 (2002), held that federal tax liens attach to the delinquent spouse's interest in a tenancy by the entirety, but expressly left open the question presented here:

> When a court allocates the proceeds from a § 7403 sale "according * * * to the interests of the parties and of the United States," must the court take into account the additional value of the survivorship right of the spouse with the longer life expectancy and any other asymmetrical rights—as held by the Second, Fifth, Ninth, and Tenth Circuits—or must it allocate the proceeds equally to each party in every situation—as held by the Third and Sixth Circuits?

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Sixth Circuit, App., *infra*, 1a-21a, is available at 617 F.3d 370. The district court's opinion, App., *infra*, 24a-32a, is available at 2008 WL 4104507.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 2010. Petitioner timely filed a petition for rehearing en banc, which was denied on September 14, 2010. App., *infra*, 33a-34a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 7403 of Title 26 of the United States Code provides, in pertinent part:

> (a) Filing.—In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax

or liability. For purposes of the preceding sentence, any acceleration of payment under section 6166(g) shall be treated as a neglect to pay tax.

(b) Parties.—All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.

(c) Adjudication and decree.—The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property, by the proper officer of the court, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States. If the property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of such lien with expenses of sale, as the Secretary directs.

STATEMENT

This case concerns how a federal district court must value an innocent spouse's interest in entireties property when a court orders its sale under 26 U.S.C. § 7403 to enforce a federal tax lien against her delinquent taxpayer husband. This Court has twice addressed the enforceability of tax liens against marital property and both times left unresolved the question of valuing a spouse's interest in such

property under § 7403. *United States* v. *Craft*, 535 U.S. 274, 289 (2002) ("We express no view as to the proper valuation of [the] interest of the entireties property."); *United States* v. *Rodgers*, 461 U.S. 677, 698 (1983) ("The exact method for the distribution required by § 7403 is not before us at this time."). This petition presents that issue, which has divided the courts of appeals.

The decision below, over a vigorous dissent, held that valuing the "interest" of a spouse in the proceeds from the sale of entireties property requires a simple 50/50 split between the innocent spouse and the United States. App., *infra*, 3a. More particularly, the Sixth Circuit determined that an innocent spouse is entitled to no greater portion of the proceeds than her delinquent taxpayer husband, even though her husband has the shorter life expectancy and the wife therefore has the greater likelihood of inheriting the entire property upon his death. That decision conflicts with decisions by four other Circuits and flies in the face of this Court's guidance regarding the correct valuation analysis under § 7403.

Statutory Background

Section 7403 authorizes federal district courts to order the sale of property in which a delinquent taxpayer holds an interest for payment of tax liabilities—notwithstanding the concurrent interest owned by an innocent third party. The statute requires that all parties having an interest in the property be made parties to the action, allows the court to decree a sale of the property, and instructs that the court distribute the sale proceeds "according

to the findings of the court in respect to the interests of the parties and of the United States." 26 U.S.C. § 7403(c). This language aims to satisfy the Takings Clause by requiring fair compensation for innocent third parties. *Rodgers*, 461 U.S. at 697-698.

In *Rodgers*, this Court examined § 7403 as it applied to two situations: a family home in which an innocent spouse held an interest along with the delinquent taxpayer, her husband (the Ingram case), and a family home held by an innocent spouse and the estate of her deceased husband (the Rodgers case). Under Texas law, each spouse had a "homestead interest" in the property, a right that this Court analogized to an undivided life estate.[1] *Rodgers*, 461 U.S. at 685-686. Acknowledging the State's robust protection of property owners against creditors, this Court emphasized that, "although the definition of underlying property interests is left to state law, the consequences that attach to those interests is a matter left to federal law." *Id.* at 683.

The Court then concluded that § 7403 empowers district courts to sell the entire property, not just the delinquent taxpayer's interest. *Rodgers*, 461 U.S. at 691-694. An innocent third party's interest in the property, the Court explained, will not block a court's ability to force sale under § 7403. This Court expressly acknowledged, however, that the spouse was entitled "to so much of the proceeds as represents complete compensation for the loss of the homestead estate." *Id.* at 680.

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[1] A life estate is an estate whose duration is measured by a designated person's life. William B. Stoebuck & Dale A. Whitman, The Law of Property § 2.11, at 58 (3d ed. 2000).

Recognizing that its holding would present lower courts with questions regarding how to value spouses' respective concurrent interests, the Court provided a guiding example for resolving the compensation issue. *Rodgers*, 461 U.S. at 698-699. Assuming that the homestead estate was the equivalent of a life estate, and using a standard actuarial table with an eight percent discount rate, the Court calculated that three innocent surviving spouses, aged 30, 50, and 70 years, would be entitled to 97%, 89%, and 64% of the proceeds, respectively. If those three spouses also had a protected half-interest in the underlying ownership right of the property, their portion of the proceeds would total 99%, 95%, and 82%, respectively. *Ibid.*

In *United States* v. *Craft*, 535 U.S. 274 (2002), the Court held that tax liens attach to property held in a tenancy by the entirety. Such property, the Court held, is likewise subject to sale under § 7403. *Id.* at 288. This form of ownership, it explained, rests on the law's notion that the husband and wife are a single person for purposes of ownership. *Id.* at 281. A spouse's interest could be alienated upon severance of the entireties tenancy, but that would require either a divorce or the consent of both spouses. *Ibid.* The Court then identified the principal interests held by tenants by the entirety, including a joint-life estate, the right of survivorship, and the right to prevent sale. *Id.* at 282.

Craft did not resolve how to value the separate interests of a spouse in entireties property. Indeed, it specifically left that question open, "express[ing] no view as to the proper valuation of respondent's

husband's interest in the entirety property." 535 U.S. at 289. Notably, in response to a passage in the taxpayer's brief raising the valuation issue, Craft Br. at 33, *United States* v. *Craft*, 535 U.S. 274 (2002) (No. 00-1831), the government asserted that the actuarial illustration set forth in *Rodgers* offered the most appropriate solution, U.S. Reply Br. at 17 n.17, *United States* v. *Craft*, 535 U.S. 274 (2002) (No. 00-1831) ("The answer to the valuation issue has factual variations but the 'rough idea' is discussed in a detailed example given by this Court in *United States* v. *Rodgers*, 461 U.S. at 698.").

District Court Proceedings

Charles Barr had tax liabilities in excess of $300,000 owing to unpaid taxes, interest, and other statutory accruals. Consequently, the government attached a federal tax lien to the home owned in a tenancy by the entirety by Mr. Barr and petitioner Carolyn Barr, his wife. The government then sought to reduce these liabilities to judgment and filed a civil action against Mr. Barr, against whom a default judgment was subsequently entered. In that proceeding, the government sought to foreclose on the marital home under § 7403 and filed a motion for summary judgment to that effect. No evidence was provided by the government as to the compensable value of a spousal entireties interest.

The district court granted the government's motion, holding that *Rodgers* and *Craft* permitted foreclosure under § 7403 on a federal tax lien on property held in a tenancy by the entirety. The district court then concluded that foreclosure was

appropriate in this case. App., *infra*, 32a. The district court held that each spouse held an interest "that may be fairly divided between them." *Ibid.* In the order of foreclosure that followed, the district court ruled that Mrs. Barr's compensation for her interest was 50% of whatever equity in the property was left after all other creditors were paid. (R. 41). The other 50% went to the government.

Court of Appeals Proceedings

A divided Sixth Circuit affirmed. App., *infra.*, 13a. The majority held that the proper way to value spouses' interests in a tenancy by the entirety under § 7403 was to split the value down the middle, observing that Michigan laws provided for equal distribution of proceeds upon consensual sale or divorce. The court quoted with approval *Popky* v. *United States*, 419 F.3d 242 (3d Cir. 2005), which justified 50/50 distribution on the grounds that such a "valuation is far simpler and less speculative" than an actuarial approach. App., *infra*, 6a (quoting *Popky*, 419 F.3d at 245).

The panel majority cast aside this Court's statement in *Rodgers* that "any calculation of the cash value of a homestead interest must of necessity be based on actuarial statistics." 461 U.S. at 704. Such valuation was necessary in *Rodgers*, the majority posited, only because of the need to decide the value of a life estate, implying without explanation that no actuarial calculation is required for a survivorship interest. The majority likewise disposed of Mrs. Barr's right to prevent sale, asserting that it had no value because it was

perfectly offset by her reciprocal inability to sell without Mr. Barr's consent. App., *infra*, 8a.

Chief Judge Batchelder issued an opinion concurring in part but dissenting on the question of valuation. While she agreed that foreclosure was permissible under § 7403, she argued that the panel majority's 50/50 solution was "simplistic" and "flawed." App., *infra*, 18a (Batchelder, C.J., concurring in part and dissenting in part). Stressing this Court's holding in *Rodgers* that innocent spouses must receive complete compensation, she urged that "district courts must take care to assure that innocent third parties receive compensation for *each* property interest they possess" to avoid potential Takings violations. *Id.* at 17a-18a n.3 (emphasis original). The panel majority's approach, she concluded, failed to follow this Court's valuation instructions. *Id.* at 21a.

The dissent further criticized the panel majority for looking to how Michigan courts deciding different state law cases involving entireties property might approach valuation because it was undisputed that valuing property interests under § 7403 is a matter of federal law. App., *infra*, 18a-19a (Batchelder, C.J., dissenting in part and concurring in part). The "weight of federal law," she explained, "argues strongly against" the 50/50 approach. *Id.* at 19a (citing *Pletz* v. *United States*, 221 F.3d 1114, 1117 (9th Cir. 2000); *United States* v. *Gibbons*, 71 F.3d 1496, 1500 (10th Cir. 1995); *Harris* v. *United States*, 764 F.2d 1126, 1131-1132 (5th Cir. 1985)). She sharply disagreed with *Popky*, upon which the panel majority relied. In her view, "[t]here is simply no

legal justification for ignoring the vested property rights of litigants in order to avoid complexity and uncertainty." *Id.* at 19a n.4.

Chief Judge Batchelder also questioned the majority's comparison of Mrs. Barr's situation to distributions of property pursuant to consensual sale or divorce. These events, she explained, are fundamentally different from a forced sale because of their timing. App., *infra*, 20a-21a (Batchelder, C.J., dissenting in part and concurring in part). In a divorce, the tenancy by the entirety is first severed by divorce decree and converted into a tenancy in common, after which the property is sold. In a consensual sale, both spouses have reached agreement that the timing and terms of the disposition are advantageous enough to warrant surrendering their rights of survivorship and to prevent sale. Both situations naturally result in presumptive equal distribution of proceeds although the spouses themselves—or a family court in a divorce proceeding—could allocate their shares differently. *Ibid.* In a § 7403 forced sale, by contrast, "the value of the non-delinquent spouse's interests must be determined prior to the § 7403 order, by which the court will extinguish those rights." *Id.* at 21a. She posited that valuing Mrs. Barr's property interests as if she had already surrendered them "would raise the unsightly specter of a taking without just compensation." *Ibid.*

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit's Decision Deepens A Split Among The Circuits Over How To Value An Innocent Spouse's Component Interests In A Tenancy By The Entirety Under 26 U.S.C. § 7403

In *Craft*, this Court expressly left open the question of how to value an innocent spouse's interest in an entireties property in a § 7403 foreclosure. 535 U.S. at 289 ("We express no view as to the proper valuation of respondent's husband's interest in the entireties property.") Ignoring the "far greater weight of the cases," the Sixth Circuit here joined the Third Circuit in holding that the value of an innocent spouse's component interests in an entireties estate is fifty percent in every situation where a court is asked to order a sale of entireties property under § 7403. App., *infra*., 19a (Batchelder, C.J., dissenting in part and concurring in part). In contrast, four circuits have held that an innocent owner's component interests should be valued actuarially. This split of authority is stark, well-established, and likely to persist. Review by this Court is therefore warranted.

A. Two Circuits Have Held That The Value Of An Innocent Spouse's Component Interests In Entireties Property Is Always Fifty Percent, Regardless Of The Spouses' Respective Life Expectancies

The Third and Sixth Circuits have adopted a universal rule that all spouses have equal survivorship interests regardless of their relative life expectancies App., *infra*., 3a; *Popky* v. *United States*,

419 F.3d 242, 245 (3d Cir. 2005). In *Popky*, the Third Circuit adopted the equal shares approach for three reasons. First, it assumed that because spouses have the same *interests* in an entireties estate, those interests necessarily must have the same *value*. *Ibid.* It reasoned that "[v]aluing the interests of tenants by the entireties equally accords with longstanding Pennsylvania common law *definitions* of tenancies by the entirety," thus tying the economic value of each spouse's interests to the formal, definitional identity of those interests. *Ibid.* (emphasis added) (citing two cases holding that spouses hold identical interests in entireties property). Second, it concluded that because the proceeds of an entireties property are distributed equally *after* "an entireties estate is severed because of a sale with consent of both tenants, divorce, or other reasons," each spouse's interests in that property must have the same value *prior to* a court-ordered severance under § 7403. *Ibid.* Finally, it declared that a 50/50 approach is "[s]ound policy" because it "is far simpler and less speculative" than an actuarial valuation. *Ibid.*

The Sixth Circuit hewed closely to the Third Circuit's three-part reasoning. First, it concluded that because the Barrs have "equal interests in their home," those interests must be valued equally. App., *infra.*, 5a ("division according to their [equal] interests results in an equal distribution of the proceeds of the sale of that home"). Second, it assumed that because the proceeds from the sale of the Barrs' property would presumptively be divided equally *after* a divorce or consensual sale severed their tenancy, their respective interests should be valued equally *prior to* severance by a forced sale

under § 7403. *Id.* at 7a. Finally, quoting *Popky*'s policy analysis, the Sixth Circuit praised the 50/50 approach as an "intuitive conclusion," *id.* at 6a, despite the dissent's admonition that "ignoring the vested property rights" of an innocent spouse for the sake of administrative convenience is unjustifiable, *id.* at 19a n.4 (Batchelder, C.J., dissenting in part and concurring in part).

The Sixth Circuit then expanded upon the Third Circuit's analysis. While the Sixth Circuit correctly identified the components of an entireties property as an implicit joint-life estate, a survivorship interest and a right to prevent sale, App., *infra.*, 6a, it simply reapplied a form of the Third Circuit's reasoning to each of them. The court held that the Barrs' survivorship rights should be valued equally because "differences in life expectancies do not result in different survivorship interests." *Id.* at 7a. If differences in life expectancies did matter, the Sixth Circuit reasoned, "Michigan law [would not] provide[] for equal division of property upon divorce or consensual sale." *Ibid.* It expressly rejected the Court's admonition in *Rodgers* to value spousal interests actuarially because "Mrs. Barr presents no compelling reason why this court should not apply the presumption of equal spousal life expectancy implicit in Michigan law." *Id.* at 8a. The Sixth Circuit then held that the Barrs' rights to prevent unilateral sale or encumbrance by the other spouse were worth the same—exactly zero—because they were "precisely reciprocal between spouses." *Ibid.*

B. Four Circuits Have Held That A Court Should Consider Life Expectancy In Valuing The Component Interests Of A Tenancy By The Entirety

Four circuits have approved the use of actuarial calculations to value the individual interests that make up a tenancy by the entirety. *Pletz* v. *United States*, 221 F.3d 1114, 1117-1118 (9th Cir. 2000); *United States* v. *Gibbons*, 71 F.3d 1496, 1501-1502 (10th Cir. 1995); *United States* v. *Baran*, 996 F.2d 25, 28 (2d Cir. 1993); *Harris* v. *United States*, 764 F.2d 1126, 1129-1132, 1132 n.3 (5th Cir. 1985); *United States* v. *Molina*, 764 F.2d 1132, 1133 (5th Cir. 1985). As this Court noted in *Craft*, the component interests that make up a tenancy by the entirety can be readily disaggregated. 535 U.S. at 281-282. For each spouse, these interests include a joint-life estate, a survivorship interest, and a right to prevent unilateral sale or encumbrance of the property by the other spouse. *Id.* at 282; see also App., *infra.*, 6a. Of course, how a court values any component interest necessarily affects the total value of a spouse's overall interests in a tenancy by the entirety.

The Fifth Circuit has held that the respective life expectancies of the spouses should be considered in valuing the "economic equivalent of a [joint] life estate," one of the central components of a tenancy by the entirety. *Harris*, 764 F.2d at 1130. Noting this Court's assertion in *Rodgers* that the use of actuarial tables is "appropriate in calculating the value of the homestead estate," the Fifth Circuit saw "no reason * * * to depart from the use of * * * Treasury tables." *Ibid.*; see also *Molina*, 764 F.2d at 1133 (requiring

use of joint-life actuarial tables to value an innocent spouse's homestead interest). Much of its discussion, in fact, concerned exactly which type of actuarial approach—using single-life or joint-life tables—was more faithful to this Court's teaching in *Rodgers*. 764 F.2d at 1130-1131 & n.2. Likewise citing this Court's decision in *Rodgers*, the Second Circuit has approved the use of actuarial tables in valuing a life estate under § 7403. *Baran*, 996 F.2d at 28.

Similarly, the Tenth Circuit has held that an innocent spouse holding a life estate and a survivorship interest is entitled to more than fifty percent of the proceeds of a § 7403 forced sale. *Gibbons*, 71 F.3d at 1501-1502. Accepting the view that the innocent spouse's interests in a life estate should be valued actuarially, the Tenth Circuit remanded the case to the district court solely to determine the effect of a possible outstanding mortgage on this calculation. *Id.* at 1502. In other words, it remanded for the district court to consider the impact of probabilistic events *in addition to* different life expectancies in valuing the innocent spouse's interests, *i.e.*, an even more complex actuarial calculation.

More recently, the Ninth Circuit followed the Fifth Circuit's decisions in *Harris* and *Molina* to hold that joint-life actuarial tables should be used to value the interests in a tenancy by the entirety when a court orders a sale under § 7403. *Pletz*, 221 F.3d at 1117-1118. In particular, it approved the district courts' and bankruptcy courts' employing "the joint-life method[] and correcting for the difference in anticipated lifespan" between the spouses to allocate

more than 50 percent of the value of the entireties property to the innocent spouse. *Id.* at 1116.

C. This Split Of Authority Is Widely Recognized And Certain To Persist

Other courts have acknowledged this conflict over how to value an innocent spouse's component interests in an entireties estate under § 7403. See, *e.g.*, *United States* v. *Goddard*, No. 1:09-CR-20, 2010 U.S. Dist. LEXIS 76336, at *8-*15 (E.D. Tenn. July 28, 2010) (discussing the "two methods which have been adopted by other courts" for valuing interests in entireties property); *Barczyk*, 697 F. Supp. 2d at 799-800 (discussing cases); *id.* at 799 (discerning "no consensus on how to value spousal interests in joint tenancies"). District and bankruptcy courts have also reached different conclusions in grappling with this issue. Compare *United States* v. *Ryan*, No. 04-0531-CV-W-GAF, 2005 WL 6153137, at *3 (W.D. Mo. July 19, 2005) (adopting the equal shares approach for reasons of "judicial economy"), with *In re Murray*, 318 B.R. 211, 214 (Bankr. M.D. Fla. 2004) (using actuarial method "[d]espite its administrative inconvenience").

Of course, this Court does not ordinarily grant review in order to settle disagreement and confusion among the district and bankruptcy courts. In this context, however, such disagreement and confusion heighten the significance of the circuit conflict because this issue will, by its nature, seldom rise to the attention of the circuit courts. Given that many disputes involving § 7403 begin in bankruptcy court, circuit court adjudication will often be the second

level of review for property owners. Only the most determined and affluent litigants are likely to pursue their claims through two appeals. Even for disputes commencing in district court, the cost of litigation is likely to rule out appellate review for a family whose last asset, a home, is about to be taken from them. Although significant over the run of cases, the economic difference between the two methods may under many circumstances not be great enough in any one case to justify the cost of an appeal. See pp. 33-34, *infra*; see *e.g.*, *United States* v. *Burtsfield*, 553 F. Supp. 2d 1194, 1200 n.5, 1202 (D. Mont. 2008) (difference between the approaches when applied to particular entireties property amounted to $8,565.90). Given the high cost of legal representation, an innocent spouse whose life expectancy exceeds that of her delinquent counterpart will often conclude that an appeal of a decision awarding equal shares is uneconomical. The financial hardship inherently accompanying most forced sales compounds this difficulty. The several cases litigated up to the circuit level within the last quarter-century have offered appellate courts only a few occasions to clarify an area of the law of fundamental importance in the bankruptcy and district courts. This case therefore presents an uncommon opportunity for this Court to resolve this important question.

II. Always Valuing The Innocent Spouse's Interest In Entireties Property At Exactly Fifty Percent Undercompensates Many, Overcompensates Others, And Conflicts With How The Government Values Life Estates And Remainder Interests In Related Contexts

Splitting the value of an entireties property 50/50 between a delinquent and an innocent spouse in a § 7403 foreclosure compensates the innocent spouse haphazardly. This "method" undervalues the entireties interests of an innocent spouse who can expect to live longer than the delinquent one while overvaluing the interest of an innocent spouse who has a shorter life expectancy. It disadvantages women, who generally live longer than men, cf. *Craft*, 535 U.S. at 289-290 ("[Entireties] ownership [is] of particular benefit to the stay-at-home spouse or mother. She is overwhelmingly likely to be the survivor that obtains title to the unencumbered property.") (Scalia, J., dissenting), especially when they are younger than their delinquent husbands. A simple 50/50 split is also inconsistent with the actuarial techniques the government itself uses to value life estates and remainder interests in related contexts.

Section 7403 allows the government to file an action to enforce a lien against any property in which a delinquent taxpayer has an interest. When others also hold interests in the property, § 7403 permits the government to foreclose on the whole property but requires that it fully compensate others for the value of their interests. *United States* v. *Rodgers*, 461 U.S. 677 (1983). Only in this way can the government

avoid taking innocent owners' property without just compensation.

By arbitrarily splitting the proceeds of § 7403 foreclosure sales 50/50 between spouses, the Third and Sixth Circuits sacrifice accuracy and just compensation to expediency and judicial convenience. Splitting the sale proceeds this way almost never values the spouses' interests correctly and often undercompensates the innocent spouse. This Court should grant review because judicial convenience cannot justify denying an innocent spouse just compensation for his or her interest in entireties property—as the statute indisputably demands.

The Sixth and Third Circuits asserted three different reasons for splitting the proceeds of a § 7403 sale 50/50. Each is mistaken. First, they assumed that because the spouses have identical *interests* in an entireties property those interests must have equal *values*. App., *infra.*, 5a; *Popky*, 419 F.3d at 245. The initial premise is correct. Under Michigan law, the spouses' interests are exactly identical:

> [E]ach tenant by the entirety possesses the right of survivorship. Each spouse * * * may also use the property, exclude third parties from it, and receive an equal share of the income produced by it. Neither spouse may unilaterally alienate or encumber the property although this may be accomplished with mutual consent.

Craft, 535 U.S. at 282. The Third and Sixth Circuits' conclusion, however, does not follow. Although some

of these identical interests have equal values, some do not. During the period of time that both spouses live and occupy the property—the joint-life estate—their use and enjoyment of the property have equal value to each spouse. For each, this interest carries the same rights–to possess, to exclude third parties, and to enjoy the property's income—until the death of the first spouse. Since these rights guarantee to each spouse the same use of the property for exactly the same amount of time, they have the same value to each spouse.

The right of survivorship, by contrast, does not. Whichever spouse outlives the other gains the whole remainder interest and the value during their joint-lifetimes should reflect the probability of each outliving the other. Thus, if one spouse is 80 percent likely to outlive the other, the value of the right of survivorship to that spouse should be 80 percent of the present value of the remainder. Just because each spouse has identical survivorship *interests*, in short, does not mean that those survivorship interests have identical *values*.

Second, the Third and Sixth Circuits concluded that because the proceeds of an entireties property are distributed equally *after* "an entireties estate is severed because of a sale with consent of both tenants, divorce, or other reasons," each spouse's interest in that property must have the same value *prior to* a court-ordered severance under § 7403. *Popky*, 419 F.3d at 245; App., *infra*., 7a. Again, the premise is correct. After formal severance of an entireties tenancy, each spouse is entitled to receive 50 percent of the value unless they agree otherwise

or, in the case of divorce, the final decree apportioning the couple's total property specifies otherwise. *Craft*, 535 U.S. at 282. But the Third and Sixth Circuits' conclusion does not follow. Prior to a formal severance of the entireties tenancy, each spouse possesses equal formal interests, some of which, particularly the right of survivorship, usually have different expected economic values, See, p. 19, *supra*. It is axiomatic, moreover, that the government must compensate a property holder for the economic value of his interest in the property at the time it is taken, not *afterwards*. *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 387 n.17 (1980); *Danforth* v. *United States*, 308 U.S. 271, 283 (1939) ("Just compensation is value at the time of the taking"). Yet, the Third and Sixth Circuits' 50/50 rule does exactly the opposite. It compensates the innocent spouse for the value of her interests *after* the § 7403 foreclosure has severed the entireties tenancy against her wishes.

Chief Judge Batchelder noted the illogic of this position:

> Even ignoring the linguistic inconsistency of asserting that a *forced* sale and a *consensual* sale should be treated the same, treating a § 7403 forced sale as equivalent to a consensual sale or sale subsequent to a divorce also ignores a fundamental question of timing. When a divorce occurs, and the property is sold, the tenancy by the entirety is severed by the divorce decree first, and only then is the property sold. The divorce decree transforms the tenancy in the entireties into a tenancy in common, so a 50/50 split from a

> subsequent sale is the natural result. Similarly, when a consensual sale occurs, both parties consent to the sale, effectively surrendering their survivor interests and their right to prevent sale. Only then is the sale effectuated, and a 50/50 split is, again, the natural result. With a sale pursuant to § 7403, however, the value of the non-delinquent spouse's interests must be determined *prior* to the § 7403 order, by which the court will extinguish those rights. Valuation of property interests under § 7403 cannot occur *as if* the non-delinquent spouse had already surrendered her interests. To do so would raise the unsightly specter of a taking without just compensation. *See Rodgers*, 461 U.S. at 697 (holding that § 7403 requires compensation for every property interest that is "taken" in the process).

App., *infra.*, 20a-21a (Batchelder, C. J., concurring in part and dissenting in part). That the entireties property gives the innocent spouse the specific right to prevent severance (except through the compulsion of divorce) compounds the error of the 50/50 rule's logic.

Third, the Third and Sixth Circuits defended the 50/50 split as "sound policy" *Popky*, 419 F.3d. at 245; App., *infra.*, 6a (quoting *Popky*, 419 F.3d. at 245), and as an "intuitive conclusion," *ibid.* As the dissent below noted, however, this policy intuition rests completely on the fact that a simple "50/50 split [is] far simpler and less speculative" than an actuarial valuation. App., *infra.*, 19a (Batchelder, C. J., concurring in part and dissenting in part) (quoting *Popky*, 419 F.3d at 245). The ease of simply splitting

the value in half is undeniable but irrelevant, particularly given the Fifth Amendment's protection against unjustly compensated takings. As the dissent further noted, "[t]here is simply no legal justification for ignoring the vested property rights of litigants in order to avoid complexity and uncertainty." App., *infra.*, 19a n.4 (Batchelder, C.J., dissenting in part and concurring in part). And judicial expedience and convenience also prove too much. A simple "equal shares" approach is an easier way to divide the value of *any* jointly-owned property. Yet, courts routinely try to determine the value of each property-holder's interest in any condemnation proceeding. See generally 1 Lewis Orgel, Valuation Under The Law Of Eminent Domain §§ 113-127 (2d ed. 1953).

In the case of complex marital property interests, this Court has instructed the lower courts to divide the property into its more familiar constituent components. *United States* v. *Rodgers*, 461 U.S. 677, 685-686 (1983). As this Court recognized in *Craft*, a Michigan tenancy by the entirety is composed of, among other interests, (1) a joint-life estate, (2) a remainder interest inherited by the surviving spouse upon the death of the first spouse, and (3) the right of each spouse to prevent the unilateral sale or encumbrance of the property by the other. *See Craft*, 535 U.S. at 282. Although each spouse has the same formal interests in the property, the economic value of those interests depends, in large part, on the relative life expectancies of the spouses.

Simply splitting the value of an entireties property 50/50 between the spouses undervalues in at least three different ways the interests of the spouse

who is expected to live longer: (1) it misallocates the value of the overall entireties property as between the joint-life estate and the remainder; (2) it then undervalues the expected value of the remainder to the spouse with the longer life expectance; and (3) it ignores completely the value to that spouse of the right to prevent unilateral alienation. First, an equal division of the proceeds from the property fails to allocate properly the property's value between the joint-life estate and the remainder. Because the joint-life estate terminates when the first spouse dies, the allocation of the property's value between the joint-life estate and the remainder depends upon the length of time that both spouses are expected to live. This initial allocation of value between the joint-life estate and the remainder interest is critical because, while the value of each spouse's interest in the joint-life estate may be identical, the expected value of their remainder interest is not. The 50/50 rule, in other words, correctly allocates at most the value of the joint-life estate. To determine how much of the overall entireties tenancy the joint-life estate represents and how to allocate the value of the remainder between the spouses requires an actuarial undertaking.

The federal tax code recognizes, in fact, that many property interests depending on life expectancy should be valued actuarially and mandates the use of actuarial techniques in many contexts similar to this one. Section 7520 of the Internal Revenue Code requires, for example, that "[f]or purposes of [The Internal Revenue Code], the value of any annuity, any interest for life or a term of years, or any remainder or reversionary interest shall be

determined * * * under tables presented by the Secretary * * * using an interest rate * * * equal to 120 percent of the Federal midterm rate." 26 U.S.C. § 7520(a); see 26 C.F.R. § 20.2031-7T (containing current table). So far as they apply, these tables must be used in valuing all life estates and remainders under the Internal Revenue Code unless another provision of the code, see, e.g., 26 U.S.C. § 7520(b) ("This section shall not apply for purposes of part I of subchapter D of Chapter 1,"), or a regulation, *ibid.* ("This section shall not apply for purposes of * * * any other provision specified in regulations."), specifies otherwise. None does in the situation here. See 26 C.F.R. §§ 1.7520-3(a), 20.2031-7T(d), 20.7520-3(a), 25.7520-3(a).

A hypothetical based on the recent case of *Marshall* v. *Marshall*, 547 U.S. 293 (2006), underscores how haphazardly the Third and Sixth Circuits' 50/50 rule compensates spouses. *Marshall* involved a married couple with widely disparate ages. At the time of their marriage, the husband was 89 years old and the wife 26. Suppose they held property as tenants by the entirety, the husband had failed to pay his taxes, and the wife was an innocent spouse. Using the Internal Revenue Code's valuation tables and the interest rate applicable in September 2010, 89.6% of the present value of the property would be captured in the remainder interest, while only 10.4% would be captured in the joint-life estate.[2] Much

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[2] 26 U.S.C. § 7520 says that an interest rate equal to 120% of the applicable federal midterm rate (computed annually) for the month in which the valuation falls is to be used in splitting the property into a life estate and remainder interest. For the month of September 2010, when these calculations were

more of the value of the property is contained in the remainder interest because the time that both spouses are expected to remain alive is relatively short.

The next step divides the value of each of these two distinct interests appropriately between the spouses. Assuming each spouse has a half claim to the joint-life estate, the 10.4% value attributed to the joint-life estate should be split 50/50: 5.2% goes to each spouse. Each spouse, however, has a quite different expectation of the remainder. The 26 year-old wife can expect to live for another 55.16 years; the 89 year-old husband only another 4.14. See Social Security Administration Period Life Tables, http://www.ssa.gov/OACT/STATS/table4c6.html (last visited Sept. 30, 2010).

Using these tables, the wife has a 99.7% chance of outliving the husband and thus a 99.7% chance that

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performed, that rate was 2.4%. See www.irs.gov/businesses/small/article/0,,id=112482,00.html (last visited Sept. 30, 2010). IRS Publication 1457 provides instructions for using the double- and single-life tables to compute the portion of the value captured in the remainder interest. According to example 6 in that publication, the portion of the property value captured in the remainder interest is equal to the Single Life Remainder Factor for Spouse 1 from Table S (interest rate 2.4%) plus the Single Life Remainder Factor for Spouse 2 from Table S (interest rate 2.4%) minus the Joint and Survivor Remainder Factor for Spouses 1 and 2 from Table R-2 (interest rate 2.4%). For a couple ages 26 and 89, those factors equal 0.30861 + 0.8958 – 0.30825 = 0.89616. See www.irs.gov/retirement/article/0,,id=206601,00.html (last visited Sept. 30, 2010) for IRS Publication 1457 and associated tables. Therefore, 89.6% of the value is captured in the remainder interest and 10.4% is captured in the life estate.

she will eventually come to possess the remainder and own the property in fee simple.[3] Therefore, her expected value of the remainder equals 99.7% of the 89.6% of the property that the remainder represents. Together, her interest in these two components of the property is half of the 10.4% the joint-life estate represents and 99.7% of the 89.5% the remainder does for a total of 94.6% of the portion of the overall property these two interests represent together. The Third and Sixth Circuit's 50/50 rule, however, would award her only 50%—slightly over half of what she is entitled to. If, by contrast, the husband were the innocent spouse, the 50/50 rule would *over*compensate him by the same amount. Under the above analysis, a 50/50 split would compensate the innocent spouse correctly only if both spouses happened to have identical life-expectancies.

One might hope that the rule would at least have the virtue of compensating innocent spouses appropriately *on average*, but even that hope would

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[3] Since the Secretary of the Treasury has not developed tables that can be used for this purpose, the Social Security Administration Life Tables were used to compute the probability that one spouse will outlive the other. This computation was done by first determining the odds that, given a spouse's current age, he or she will die at each future age. For a 26 year-old female, the probabilities that she will die at age 26, at age 27, at age 28, and so forth was computed. For an 89 year-old male, the odds that he will die at age 89, at age 90, at age 91, and so forth was also computed. Using these probabilities, the probability that the husband will die in a given year while the wife remains alive was computed by multiplying the odds that he will die in the current year by the odds that she will die in a future year. That probability was computed for 2010, 2011, 2012, and so forth. These probabilities were then added together to compute the total probability that the wife will outlive the husband.

be mistaken. Unless innocent and delinquent spouses have identical life expectancies *on average*, it would not. The Third and Sixth Circuits certainly offered no support for this quite specific and peculiar actuarial assumption and commonsense offers no ground for it either. Even if it were true, however, it would offer no defense for the 50/50 rule. The government cannot justify undercompensating in one taking because it has overcompensated in a different one. An error that cuts both ways is doubly error.

In *Craft*, moreover, the government twice conceded that the value of jointly-owned property should be allocated actuarially—once in its reply brief, U.S. Reply Br. at 17 n.17, *United States* v. *Craft*, 535 U.S. 274 (2002) (No. 00-1831) ("The answer to the valuation issue has factual variations but the 'rough idea' is discussed in a detailed example given by this Court in *United States* v. *Rodgers*, 461 U.S. at 698."), and once in oral argument. In response to the Court's question about how to value a spousal interest in entireties property—"[i]n your view, you always value the [delinquent] taxpayer's interest at 50 percent"—the government responded:

> No. I think in the Rodgers – well, if the property's been sold, yes. If the property hasn't been sold, and we're talking about in a foreclosure context, I believe the Rodgers court goes through the example of the varying life expectancies of the two tenants, and which one – and I believe what the Court in Rodgers said was that each of them should be treated as if they have a life estate plus a right of survivorship, and the Court explains how that could well – I think in the facts of

> Rodgers resulted in only 10 percent of the proceeds being applied to the husband's interest and 90 percent being retained on behalf of the spouse.

Transcript of Oral Argument at 15, *United States* v. *Craft*, 535 U.S. 274 (2002) (No. 00-1831). Like the dissent below, the government argued that a 50/50 split was appropriate *only if* the property had already been sold—and the tenancy thus severed—by the husband and wife together.

The government itself, moreover, has recognized the appropriateness of actuarially valuing spouses' interests in entireties property when collecting gift taxes. Before 1981, the Internal Revenue Code allowed spouses to elect to pay gift taxes on the creation of a entireties interest (as opposed to paying a gift on sale of the property) 26 C.F.R. § 25.2515-1(b). If they made that election, Treasury regulations required an actuarial valuation of the size of the gift as between the spouses. See *id.* §§ 25.2515-2(b)(2)&(c) (requiring actuarial valuation); see also *id.* §§ 25.2512-5 & 25.2512-5T (elaborating particular actuarial method). Furthermore, if such election is made, when the tenancy terminates, Treasury regulations require that any difference between the value actually received by each spouse and the actuarial value of each spouse's interest in the tenancy to be treated as a gift. *Id.* § 25.2515-4(b)[4].

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[4] § 2515 under which the regulations were promulgated, was repealed in 1981 when unlimited nontaxable gifts were allowed between spouses, but its regulations are still given effect for gifts to non-citizen spouses under 26 U.S.C. 2523(i). Gifts to non-citizen spouses are taxable under the old rules.

As these regulations show, the government itself recognizes that the values of spouses' interests in entireties property are not always the same and depend upon their life expectancies. Actuarial calculations of a spousal interest have been a standard in revenue collection for many years.

Finally, tenancy by the entirety entails an additional right not included in the valuation above—the right to prevent sale or encumbrance. Under this form of joint ownership, either spouse may prevent the unilateral sale or encumbrance of the property by the other. This entitlement protects each spouse's interest in marital property in two important ways: it ensures that a spouse (i) can use the entireties asset for that spouse's entire lifetime, which is particularly important in the case of a home, and (ii) receive the remainder if the other spouse predeceases them. This right is especially valuable in three situations: when creditors come knocking, when one spouse would seek to defeat the interest of the other by sale or encumbrance, and when one spouse wants to sell but the other does not because the proceeds from the sale of the home would not allow the couple to purchase a comparable home or the hesitant spouse believes the market for the home is depressed but likely to eventually rebound.

In this case, the difference in life expectancies means that Mrs. Barr's ability to prevent Mr. Barr from selling the house in which she is entitled to remain for the rest of her life is more valuable than his ability to prevent her from selling the same house. The courts below, however, gave no value to this right, let alone an actuarial one. Such treatment

ignores the value of an important stick in the spousal bundle and conflicts with Treasury regulations, which recognize some special value in this right in the related gift tax context. When, "under the law of the jurisdiction governing the rights of the spouses each is entitled to share in the income or other enjoyment of the property but *neither, acting alone, may defeat the right of a survivor of them to the whole of the property*," the property is subject to actuarial valuation that imputes greater value to the spouse with the longer life expectancy. 26 C.F.R. § 2515-2(b)(2) (emphasis added).

III. This Issue Is Important And Recurring

The question presented here is of great practical importance to millions of ordinary Americans. The issue could potentially arise in literally thousands of tax disputes each year, and recent data show that it has become one of the most frequently litigated federal tax questions. Thus, even if the dollar amount at issue in any particular case is limited, proper valuation of property sold under § 7403 is of significant magnitude in the aggregate and extremely important to the affected individuals—particularly innocent spouses.

Taxpayers commonly hold property in a tenancy by the entirety. Twenty-six States and the District of Columbia permit married individuals to hold entireties property. DENIS CLIFFORD, PLAN YOUR ESTATE 168 (10th ed. 2010). These jurisdictions are home to approximately 67.5 million married persons. *See* U.S. Census Bureau, *Census 2000 Demographic Profiles*, http://censtats.census.gov/pub/Profiles.shtml

(collecting demographic data on U.S. jurisdictions). Accordingly, it is no exaggeration to say that the issue of how to value entireties property cuts across a broad swath of American taxpayers.

What is more, the valuation of an innocent spouse's property interests is not limited to the marital home. A federal tax lien attaches to *all* of a taxpayer's real and personal property, the rights to such property, and any property acquired by the taxpayer after the assessment date. 26 U.S.C. § 6321; see IRM § 5.17.2.5 (Dec. 14, 2007) ("This is a very broad concept and includes not only items which are typically thought of as property, e.g., tangible items and 'things,' but also intangible items and 'rights' which a taxpayer may have, but are not necessarily marketable.") Thus, for over 100 million married Americans, the proper valuation of ownership interests apparently applies not only to their homes, but also to their vehicles, their financial accounts, and all manner of personal property.

Moreover, as this Court recognized in *Rodgers*, similar issues of valuation arise with other forms of joint ownership. 461 U.S. 677, 698-699 (1983) (holding that an innocent spouse sharing a "homestead" interest with a delinquent taxpayer had similar property rights requiring proper valuation). In particular, many of these same issues arise in valuing individual interests in joint tenancies, which, like entireties tenancies, grant a joint-life estate and a right of survivorship to each tenant but, unlike entireties tenancies, grant no right to prevent unilateral severance by other tenants. William B. Stoebuck & Dale A. Whitman, The Law of Property

§ 5.3 (3d ed. 2000). Many married persons, including many in entireties states, hold property as joint tenants and that property includes many different types. "It is common for real estate to be owned in joint tenancy, but any type of property can be owned in this manner and avoid probate. Bank accounts, automobiles, boats, and mobile homes are all routinely held in joint tenancy * * *." Denis Clifford, Plan Your Estate 165 (10th ed. 2010). The valuation principles at stake in this case thus potentially affect even the 52.7 million married individuals living in the twenty-four states that do *not* allow couples to hold proper as tenants by the entirety. See U.S. Census Bureau, *Census 2000 Demographic Profiles*, http://censtats.census.gov/ pub/Profiles.shtml.

Nor are these principles of potential concern to only the 120.2 million married individuals in the United States. Unmarried individuals may also hold property as joint tenants, benefitting from the same life estate and remainder interest at issue here. Forty-nine states and the District of Columbia permit unmarried individuals to hold property in a joint tenancy with right of survivorship, Denis Clifford, Plan Your Estate 166 (10th ed. 2010). The issue of how properly to value individual interests in jointly-owned property is thus potentially important to nearly everyone who holds joint-owned property in this country.

Perhaps due to their expansive reach, federal tax liens are an increasingly common collection mechanism. Over the past decade, the IRS has dramatically increased its use of federal tax liens, filing 965,618 in Fiscal Year 2009, an increase of

84.6% over the last five years and an astounding 474.7% increase over the past decade. IRS, DATA BOOK, 1999-2009, Tables 16a & 16b (1999-2009), available at http://www.irs.gov/taxstats/article/0,,id=207457,00.html (last updated May 26, 2010) (follow "1994-2001" and "2002-2009" hyperlinks)

The IRS frequently enforces these liens under § 7403. Federal tax liens are often contentious; the Taxpayer Advocate Service, an independent organization within the IRS, reported assisting taxpayers with federal lien issues 4,650 times during Fiscal Year 2009, 1 IRS, NATIONAL TAXPAYER ADVOCATE 2009 REP. TO CONGRESS 527, which is more than the number of times it assisted taxpayers with issues concerning a failure to file or failure to pay a penalty, *ibid.* Further, the enforcement of federal tax liens under § 7403 was one of the 10 most litigated tax issue in federal courts in the latter half of 2008 and early half of 2009, *id.* at 403, with some 61 cases culminating in a judicial opinion, *id.* at 465. These cases have been litigated in both the courts of appeals, see, *e.g.*, *United States* v. *Gomes*, 292 Fed. Appx. 570 (9th Cir. 2008), and the district courts, see, *e.g.*, *United States* v. *Zurn*, Case No. CV 07-07766 GW (FMOx), 2009 U.S. Dist. LEXIS 27920 (C.D. Cal. Jan. 29, 2009).

Those fully litigated cases are just the tip of the iceberg. The severely strained financial resources of many delinquent taxpayers and their spouses make it impractical for many to seek full judicial review. Simply put, ordinary Americans cannot often afford to litigate against the IRS. See generally Tom

Herman, *How to Fight the IRS*, WALL ST. J. April 12, 2010, at R1 (describing the IRS as "one of the most powerful government bureaucracies on the planet" and noting that "[s]eemingly routine struggles can drag on for years").

This Court routinely accepts cases of significant magnitude, recognizing their importance even when an individual case is limited in scope. See, *e.g.*, *Vaden* v. *Discover Bank*, 129 S. Ct. 1262, 1268 (2009) (deciding whether federal courts have subject matter jurisdiction to compel arbitration in the context of a $10,610.74 credit card debt dispute); *Locke* v. *Karass*, 129 S. Ct. 798, 802 (2009) (deciding whether non-union employees' First Amendment rights were violated by a $9.70 per month union service fee).

Particularly in difficult economic conditions, the rate of tax delinquencies tends to increase. "The government's need to sustain the current level of revenue and collect delinquent tax liability during a recession may increase the number of these actions in the future." See 1 IRS, NATIONAL TAXPAYER ADVOCATE 2009 REP. TO CONGRESS 470. For the innocent spouses who *do* litigate the IRS's artificial valuation of property interests during the enforcement of federal tax liens, the modest dollar amount at issue may well represent the last of their financial reserves. The proper valuation of property interests is and will remain an important and recurring issue that deserves the attention of this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 2010

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CAROLYN C.BARR,
Defendant-Appellant,

CHARLES J. BARR; COMERICA INCORPORATED; CITY OF DETROIT and COUNTY OF WAYNE,
Defendants.

No. 09-1710

Appeal from the United States District Court
For the Eastern District of Michigan at Ann Arbor.
No. 07-11717 — John Corbett O'Meara,
District Judge.

Argued: April 21, 2010

Decided and Filed: August 4, 2010

Before: BATCHELDER, Chief Judge; ROGERS, Circuit Judge; GREER, District Judge.*

COUNSEL

ARGUED: Neal Nusholtz, LAW OFFICE, Birmingham, Michigan, for Appellant. John A. Nolet, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. **ON BRIEF:** Neal Nusholtz, LAW OFFICE, Birmingham, Michigan, for Appellant. John A. Nolet, Thomas J. Clark, DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

ROGERS, J., delivered the opinion of the court, in which GREER, D. J., joined. BATCHELDER, C. J. delivered a separate opinion concurring in part and dissenting in part.

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* The Honorable J. Ronnie Greer, United States District Judge for the Eastern District of Tennessee, sitting by designation.

OPINION

ROGERS, Circuit Judge. The Government seeks to foreclose the federal income tax debt owed by Charles Barr against the home that he and his wife Carolyn own as tenants by the entirety. Mrs. Barr argues on appeal, as she did before the district court, that she is entitled to the vast majority of the sale proceeds of any foreclosure sale and that foreclosure is not appropriate based on her dominant interest in the home and other equitable factors. Because spouses owning property as tenants by the entirety are entitled to equal distribution of proceeds under all circumstances contemplated by Michigan law, such an equal division is also proper in this case. In light of this equal division, the district court correctly determined that foreclosure was appropriate.

Charles Barr owed the Government more than three hundred thousand dollars in unpaid income taxes, interest, and other statutory accruals. The Government filed suit seeking to foreclose the federal tax lien created by these debts against the home in Detroit, Michigan, that Mr. Barr and his wife Carolyn Barr own as tenants by the entirety. Mr. Barr did not file a response in the case, and the district court granted default judgment against Mr. Barr in the amount of his tax debt. The Government then filed a motion for summary judgment on its foreclosure claim. Mrs. Barr opposed the motion and asked the district court to exercise its limited equitable discretion to decline to order the sale of the home.

She argued in particular that, because she was likely to outlive her husband, her interest in the home was more than fifty percent of the value of the home. She contended that foreclosure was therefore inappropriate because of her larger interest and because only her husband had unpaid federal tax liabilities. The Government argued that an equal division was appropriate under Michigan law and that Mrs. Barr had assisted in shifting properties other than the home out of Mr. Barr's name and into her name. The Government thus urged the conclusion that Mrs. Barr bore some of the responsibility for the fact that the Government could only collect taxes from Mr. Barr by foreclosure. The district court held that an equal division of any proceeds was appropriate, and the court refused to exercise its equitable discretion to prevent the foreclosure sale. Mrs. Barr now appeals, arguing primarily that the district court erred in determining that she was only entitled to half of the proceeds of any foreclosure sale.

Mrs. Barr is entitled to fifty percent of the proceeds of the foreclosure sale of the home. Title 26 U.S.C. § 7403 authorizes federal courts to decree a sale of property to enforce a federal tax lien. When such a foreclosure sale takes place, the proceeds are to be distributed "according to the findings of the court in respect to the interests of the parties and of the United States," thus providing fair compensation both to the Government and to any third parties. *Id.* § 7403(c). In determining property interests for federal tax law purposes, "the definition of underlying property interests is left to state law, [and] the consequences that attach to those interests is a

matter left to federal law." *United States v. Rodgers*, 461 U.S. 677, 683, (1983). Under Michigan law, Mr. and Mrs. Barr have identical rights to their marital home. Indeed, spouses are entitled to equal interests in entireties property in every situation contemplated by Michigan law. Spouses are "equally entitled to the rents, products, income, or profits . . . of real . . . property held by them as tenants by the entirety." Mich. Comp. Laws § 557.71. If property held by the entirety is sold, each spouse is entitled to half of the proceeds, and upon divorce, state law provides for a default equal division of such property. *Id.* § 552.102; *United States v. Craft*, 535 U.S. 274, 282 (2002). Under 26 U.S.C. § 7403(c), the "distribution of the proceeds" of a tax foreclosure sale is made "according to the findings of the court in respect to the interests of the parties and of the United States." Because Mr. and Mrs. Barr have equal interests in their home, division according to their interests results in an equal distribution of the proceeds of the sale of that home. The Third Circuit has reached the same conclusion in the context of distributing the proceeds of the market sale of a federal tax-encumbered home that had been owned by a married couple as tenants by the entirety. *Popky v. United States*, 419 F.3d 242, 245 (3d Cir. 2005). The Third Circuit noted that Pennsylvania entireties law was materially similar to that of Michigan, *id.* at 244, and reasoned as follows:

> As the District Court correctly observed, "the equal division of assets between spouses . . . parallels the distribution of entireties property when an entireties estate is severed because of a sale with consent of both tenants, divorce or other

> reasons." Sound policy reinforces the District Court's approach to valuation, as an equal valuation is far simpler and less speculative than the valuation contemplated by the [married couple].

Id. at 245 (citations omitted) (first alteration in original).

Detailed consideration of the component interests of a tenancy by the entirety reinforces this intuitive conclusion. A tenancy by the entirety under Michigan law consists of at least the following rights:

> the right to use the property, the right to exclude third parties from it, the right to a share of income produced from it, the right of survivorship, the right to become a tenant in common with equal shares upon divorce, the right to sell the property with the [the other spouse]'s consent and to receive half the proceeds from such a sale, the right to place an encumbrance on the property with the [the other spouse]'s consent, and the right to block [the other spouse] from selling or encumbering the property unilaterally.

Craft, 535 U.S. at 282. Mrs. Barr asserts that her right of survivorship and her right to prevent sale or encumbrance of the property are worth more than her husband's survivorship and sale-prevention rights, but both of these rights generate equal spousal interests.

Michigan law dictates the result that survivorship rights are equal between spouses. If the spouse with the greater life expectancy had a larger interest under Michigan law, then this greater interest would be reflected in the Michigan rules for dividing property upon divorce or consensual sale. However, because Michigan law provides for equal division of property upon divorce or consensual sale, differences in life expectancy do not result in different survivorship interests.

This conclusion is consistent with *Rodgers*. In *Rodgers*, Lucille Rodgers was the widow of Philip Bosco, a tax debtor. 461 U.S. at 687. Rodgers and her husband had owned and occupied their home as a homestead under Texas law. *Id.* Texas law provides that, at the death of one spouse, the other spouse "has a vested estate in the [homestead property] of which she cannot be divested during her life except by abandonment or a voluntary conveyance." *Id.* at 686 (quoting *Paddock v. Siemoneit*, 218 S.W.2d 428, 436 (Tex. 1949)). Rodgers thus effectively had a life estate in her marital home. *See id.* at 686. The *Rodgers* Court held that the Government could force a sale of the home under § 7403 to satisfy Bosco's tax debt. *Id.* at 703-04. Recognizing that Rodgers was entitled to a share of the proceeds of that sale corresponding with her interest in the homestead property, the Court offered, "*only for the sake of illustration,*" an example of how such property might be valued. *Id.* at 698-99 (emphasis in original). The Court suggested that a proper way to value Rodgers's life estate would be to assume an eight percent discount rate, assume that Rodgers would live to her life expectancy, and thus calculate her share of the

property's value. *Id.* This kind of actuarial calculation is not appropriate in the present case. *Rodgers* used actuarial valuation only out of necessity: one cannot determine the value of a life estate—which is effectively what Rodgers possessed—without estimating the length of the measuring life. The Supreme Court thus based its choice of valuation method on the fact that "any calculation of the cash value of a homestead interest must of necessity be based on actuarial statistics." *Id.* at 704. No such necessity exists here, and Mrs. Barr presents no compelling reason why this court should not apply the presumption of equal spousal life expectancy implicit in Michigan law.

Mrs. Barr's right to prevent sale also does not support her contention that her interest in the marital home is greater than that of her husband. Mrs. Barr asserts first that her right to prevent sale must have some value, and that this value must increase her interest in the property. This argument overlooks the fact that the ban on unilateral alienation is both a benefit and a detriment to owners of entireties property. Mrs. Barr's sale-prevention right enhances her interest because she can prevent a sale desired only by Mr. Barr. But the same rule detracts from her interest, as she cannot sell or encumber her interest in the property without Mr. Barr's permission. Because these rights are precisely reciprocal between spouses, they have no net effect on the relative interests of spouses who own property as tenants by the entirety.

Relying by analogy on Takings Clause precedents, Mrs. Barr secondly asserts that the fact

that she is being deprived of her right to prevent sale distinguishes the present situation from a consensual sale, and thus undermines the conclusion that Michigan law implicitly supports an equal assignment of interests. In upholding § 7403 as consistent with the Fifth Amendment, the Supreme Court in *Rodgers* noted that, "[t]o the extent that third-party property interests are 'taken' in the process [of a tax foreclosure], § 7403 provides compensation for that 'taking' by requiring that the court distribute the proceeds of the sale 'according to the findings of the court in respect to the interests of the parties and of the United States.'" 461 U.S. at 697-98. Mrs. Barr is correct that the exercise of the Government's power to force the sale of her home deprives her of her right to refuse a sale, and she is not specifically being compensated for that loss. But this is consistent with the general rule under the Takings Clause that property owners are paid only the fair market value of their property when they are forced to part with it against their will. *See Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 9-10, (1984). "'Under this standard, the owner is entitled to receive what a willing buyer would pay in cash to a willing seller at the time of the taking.'" *Id.* at 10 (quoting *United States v. 564.54 Acres of Land*, 441 U.S. 506, (1979)) (internal quotation marks omitted). The Supreme Court has acknowledged that, "[p]articularly when property has some special value to its owner because of its adaptability to his particular use, the fair-market-value measure does not make the owner whole." *Id.* at 10 n. 15. But "[w]e are willing to tolerate such occasional inequity because of the difficulty of assessing the value an individual places upon a particular piece of property

and because of the need for a clear, easily administrable rule governing the measure of 'just compensation.'" *Id.* The present situation is distinguishable from a consensual sale only in that Mrs. Barr is being forced to sell the home against her will. Because the Takings Clause does not require compensation for such a loss, Takings Clause jurisprudence supports the conclusion that Mrs. Barr should receive no more here than she would receive after a consensual sale: fifty percent.

Mrs. Barr also asserts that she has an interest in the home greater than half of its value based on a variety of theories that would result in the total of her and her husband's interests in the property's being greater than one hundred percent. Such a result is not possible under § 7403, which requires courts to distribute "the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States." One cannot distribute more than the total value of the sale price, and thus the total of all of the interests in the property—including that of the United States—must be one hundred percent.

The district court therefore correctly determined that Mrs. Barr is entitled to fifty percent of the proceeds of the foreclosure sale. This conclusion renders moot Mrs. Barr's argument that, if this court were to overturn the district court's finding with respect to valuation, remand would be appropriate to determine whether the equities continued to support a sale of the home.

Mrs. Barr also argues that the district court erred in granting summary judgment because it failed to conduct in a proper manner the balancing test described in *Rodgers*. This argument fails because the *Rodgers* Court did not mandate application of the four-factor balancing test before a district court could order a sale under § 7403. To the contrary, the *Rodgers* Court established the balancing test as a requirement only after the district court first determines that a § 7403 sale would cause undue hardship to an innocent third-party; before exercising its limited discretion not to order the sale, a district court must justify that decision by means of the *Rodgers* balancing test. This conclusion is supported by the *Rodgers* Court's declaration that the Government has a "paramount interest" in collecting taxes, 461 U.S. at 711, and follows established precedent in the Seventh Circuit, *United States v. Davenport*, 106 F.3d 1333, 1338 (7th Cir. 1997) (holding that application of the *Rodgers* factors "is not a prerequisite to a district court's power to decree a sale under § 7403").

Even if the *Rodgers* Court had intended to mandate application of its four-part balancing test prior to any court-ordered foreclosure sale under § 7403, we would still affirm the decision of the district court, as there is no evidence that the district court abused its discretion. In determining that foreclosure was appropriate, the district court applied the four *Rodgers* factors:

> (1) "the extent to which the Government's financial interest would be prejudiced if it were relegated to a forced sale of the partial

> interest actually liable for the delinquent taxes;" (2) "whether the third party with a non-liable separate interest in the property would, in the normal course of events (leaving aside § 7403 and eminent domain proceedings, of course), have a legally recognized expectation that separate property would not be subject to forced sale by the delinquent taxpayer or his or her creditors;" (3) "the likely prejudice to the third party, both in personal dislocation costs and in . . . practical undercompensation;" and (4) "the relative character and value of the non-liable and liable interests held in the property."

United States v. Barr, No. 07-11717, 2008 WL 4104507, at *2 (E.D. Mich. Sept. 2, 2008) (quoting *Rodgers*, 461 U.S. at 710-11). The district court determined that the first factor weighed in favor of foreclosure because "the United States cannot look to any other assets of [Mr. Barr] to collect." *Id.* at *3. The district court noted that, under normal circumstances, the second factor would weigh against foreclosure. *Id.* The court, however, found that Mrs. Barr had "participated in the conveyance of four properties . . . specifically contemplated to frustrate the United States' tax collection efforts," and thus the court determined that this factor was not entitled to much weight. *Id.* (citing *United States v. Bierbrauer*, 936 F.2d 373, 376 (8th Cir. 1991)). With respect to the third factor, the district court determined that "[t]he inconvenience of [Mrs. Barr's] relocating is no different from the inconvenience associated with any foreclosure sale and is insufficient to support a denial

of such a sale in this case." *Id.* The court explained that "if 'the inherent indignity and inequity of being removed from one's home' automatically precluded foreclosure, 'the government could never foreclose against a jointly owned residence—a result clearly untenable under § 7403.'" *Id.* (quoting *Bierbrauer*, 936 F.2d at 375-76). Finally, the district court determined that the fourth factor did not support application of the court's limited equitable discretion not to order foreclosure because Mrs. Barr had only a half interest in the property. *Id.* at *4. The district court thus found that foreclosure was appropriate and granted summary judgment to the Government. *Id.* We agree with the district court's resolution of these issues and therefore adopt the district court's thoughtful reasoning with regard to the *Rodgers* factors.

We therefore **AFFIRM** the judgment of the district court.

CONCURRING IN PART, DISSENTING IN PART

ALICE M. BATCHELDER, Chief Judge, concurring in part and dissenting in part. I concur with the majority opinion's conclusion that foreclosure of the residence of Charles and Carolyn Barr was appropriate pursuant to 26 U.S.C. § 7403. The majority opinion, however, conflates two distinct issues: (1) whether foreclosure is appropriate, in order to satisfy the tax obligations of her husband, Charles Barr; and (2) the proper distribution of the sales proceeds post-foreclosure. The majority opinion appears to conclude that the district court was correct *because* it was also correct in determining that Mrs. Barr was entitled to only 50% of the net sales proceeds. While I agree that foreclosure was correct, there is no legal justification for concluding, as the majority opinion does, that the propriety of foreclosure is somehow dependent upon a particular distribution of proceeds. I also strongly reject the majority opinion's surprising conclusion that Michigan law requires us to treat a forced sale for tax purposes as identical to a consensual sale. For these reasons, I respectfully dissent.

A. The District Court's Order of Foreclosure

It is undisputed that the government had the right to request, pursuant to 26 U.S.C. § 7403, that the district court order the sale of the Residence. *United States v. Rodgers*, 461 U.S. 677, 680, (1983) (holding that § 7403 "grant[s] power to order the

sale"); *United States v. Craft*, 535 U.S. 274, 283, (2002) (holding that, under Michigan law, tenants in the entirety possess sufficient property interests for federal tax liens to attach). The power to order the sale, however, "is limited to some degree by equitable discretion" and, if the property is sold, the non-delinquent spouse is entitled to the portion of the sale proceeds "as represents complete compensation for the loss of the [property interests]." *Rodgers*, 461 U.S. at 680.

The plain language of § 7403 indicates that a district court *may* order the sale of property, which allows the district court "limited room . . . for the exercise of reasoned discretion." *Id.* at 706. However, the Supreme Court has stated that this discretion is limited and "should be exercised rigorously and sparingly, keeping in mind the Government's paramount interest in prompt and certain collection of delinquent taxes." *Id.* at 711. In determining whether to decline to authorize a sale, a district court should consider, among others, the following factors: (1) the extent to which the government's financial interests would be prejudiced if it could sell only a partial interest in the property, rather than the property as a whole; (2) whether the third party with a non-liable separate interest would, in the normal course of events, have a legally recognized expectation that the property would not be subject to a forced sale; (3) the likely prejudice to the third party, both in personal dislocation costs and practical undercompensation; and (4) the relative

character and value of the non-liable and liable interests held in the property.[1] *Id.* at 710-11.

The majority opinion correctly rejects Mrs. Barr's argument that the *Rodgers* balancing test is mandatory. The majority opinion also correctly concludes that, even if the balancing test was mandatory, foreclosure would still have been required under § 7403. However, although the district court did not err in concluding that foreclosure was appropriate, it did err in its discussion of the second factor and Mrs. Barr's alleged complicity with the transfer of four Saginaw, Michigan properties in order to "frustrate the United States' tax collection efforts."

Mrs. Barr had a legal right to preclude sale of the Residence, and there is no legal justification for concluding that her participation in the transfer of the Saginaw Properties somehow eliminated that "legally recognized expectation" that the Residence could not be sold without her permission. The district court was correct that Mrs. Barr's unclean hands argue against an exercise of discretion in her favor, but that does not justify an incorrect

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[1] This factor could be misinterpreted as establishing a correct division of post-foreclosure sale assets as a prerequisite for foreclosure under § 7403. However, the *Rodgers* Court was concerned only with the possibility that the third party interest might be so large as to swamp the interest of the delinquent taxpayer's interest. "[I]f, on the other hand, the third party not only has a possessory interest or fee interest, but that interest is worth 99% of the value of the property, then there might well be virtually no reason to allow the sale to proceed." *Rodgers*, 461 U.S. at 711.

application of the second *Rodgers* factor, especially since the *Rodgers* Court expressly stated that the four factors listed did not comprise a comprehensive list, thus allowing for other considerations. *Rodgers*, 461 U.S. at 710. The district court should have concluded that the second factor weighed in favor of Mrs. Barr, and discussed Mrs. Barr's participation of the transfers of the Saginaw properties when considering other equitable factors relative to the proposed foreclosure.[2]

B. The District Court's Valuation of Property Interests

The district court is also charged with determining the proper division of sale proceeds between innocent third parties and the government. The Supreme Court has offered the following instructions to guide that process: (1) distribution of the sale proceeds must consider all the interests held by the parties, *Rodgers*, 461 U.S. at 681; (2) the district court must look to state law to determine each party's "bundle of sticks - a collection of individual rights which, in certain combinations, constitute property," *Craft*, 535 U.S. at 278; (3) the district court must ensure that innocent third parties receive "complete compensation" for their interests, *Rodgers*, 461 U.S. at 680;[3] (4) the district court may

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[2] While this may seem hyper-technical, this area of the law has suffered from a lack of clarity for long enough. We ought to clarify the analysis that the district courts should conduct in cases such as these, even at the risk of appearing hyper-technical.

[3] According to the *Rodgers* Court, it is only through awarding complete compensation to the innocent third party

not award the government any more of the proceeds than the share to which it is entitled, *id.* at 699 (declaring that the provisions of § 7403 "ensur[e] that the Government not receive out of the proceeds of the sale any more than to which it is properly entitled"); and (5) the government's interest is limited to the interest held by the delinquent taxpayer, which interest must be established prior to the § 7403 order of sale, *id.* at 690-91. These guidelines make it abundantly clear that Mrs. Barr's proposed valuation method is illogical and unsupportable. However, the majority opinion's simplistic valuation method is similarly flawed.

The majority opinion correctly identifies the property rights Mrs. Barr possesses—a life estate, a survivor interest, and a right to prevent sale, among others—but then loses its way by attempting to infer precisely how a Michigan court would value those property interests in a situation like this. I strongly disagree with the majority opinion's conclusion that a § 7403 forced sale is equivalent to a divorce or consensual sale, for reasons I describe in greater detail below. However, even if Michigan courts would agree with the majority opinion on this point, that conclusion is irrelevant to our consideration of the issues here, because "although the definition of underlying property interests is left to state law, the consequences that attach to those interests is a

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that § 7403 avoids any "difficulties under the Due Process Clause of the Fifth Amendment." *Rodgers*, 461 U.S. at 697. Therefore, district courts must take care to assure that innocent third parties receive compensation for *each* property interest they possess.

matter left to federal law." *Rodgers*, 461 U.S. at 683. We are constrained to recognize the property rights Mrs. Barr possesses under Michigan law, but the issue of how those interests are to be compensated is solely a matter of federal law.

The weight of federal law argues strongly against the majority opinion's conclusion that Mrs. Barr is entitled to a simple fifty percent interest because she is a tenant by the entireties. The district court and the majority opinion rely on *United States v. Popky*, 419 F.3d 242, 245 (3d Cir. 2005), in which the Third Circuit adopted a 50/50 split for tenants by the entireties because a 50/50 split was "far simpler and less speculative," and because the Third Circuit viewed a § 7403 sale as equivalent to a consensual sale, *id.*[4] However, the far greater weight of the cases support a different approach. *See Harris v. United States*, 764 F.2d 1126, 1131-32 (5th Cir. 1985) (valuing the spouses' life estates and contingent survivor interests and determining that, based on her higher life expectancy, the wife had a 50.98% interest.); *United States v. Gibbons*, 71 F.3d 1496, 1500 (10th Cir. 1995) (requiring the valuation of an ex-wife's life estate and survivor interest and concluding that she was entitled to greater than one-half the total value of the property); *In re Pletz*, 221 F.3d 1114, 1117 (9th Cir. 2000) (holding that

[4] There is simply no legal justification for ignoring the vested property rights of litigants in order to avoid complexity and uncertainty and, while I do not believe the majority opinion was adopting that particular rationale in support of its conclusion, I believe we should explicitly reject the Third Circuit's simplicity rationale.

proper valuation requires consideration of the life expectancies of the joint tenants, and rejecting the proposition that the wife's share was limited to a half interest in the life estate).

Likewise, while this Circuit has never directly addressed this question, our prior decisions in other contexts support a rejection of a blanket 50/50 split. In *United States v. 2525 Leroy Lane,* 910 F.2d 343 (6th Cir. 1990), this court was faced with a criminal forfeiture proceeding in which the property to be sold, via forfeiture, was held as a joint tenancy by the entireties. The court refused to sever the entireties estate and turn it into a tenancy in common because doing so "would not adequately compensate [the wife] for her survivorship interest." *Id.* at 350. Unquestionably, the wife in *2525 Leroy Lane* would have been entitled to only a one-half share of a tenancy in common, so this court has already determined that an innocent spouse's interest in a tenancy by the entireties must be valued higher than an equivalent interest in a tenancy in common if it is probable that the innocent spouse will outlive the guilty (delinquent) spouse.

Even ignoring the linguistic inconsistency of asserting that a *forced* sale and a *consensual* sale should be treated the same, treating a § 7403 forced sale as equivalent to a consensual sale or sale subsequent to a divorce also ignores a fundamental question of timing. When a divorce occurs, and the property is sold, the tenancy by the entirety is severed by the divorce decree first, and only then is the property sold. The divorce decree transforms the tenancy in the entireties into a tenancy in common,

so a 50/50 split from a subsequent sale is the natural result. Similarly, when a consensual sale occurs, both parties consent to the sale, effectively surrendering their survivor interests and their right to prevent sale. Only then is the sale effectuated, and a 50/50 split is, again, the natural result. With a sale pursuant to § 7403, however, the value of the non-delinquent spouse's interests must be determined *prior* to the § 7403 order, by which the court will extinguish those rights. Valuation of property interests under § 7403 cannot occur *as if* the non-delinquent spouse had already surrendered her interests. To do so would raise the unsightly specter of a taking without just compensation. *See Rodgers,* 461 U.S. at 697 (holding that § 7403 requires compensation for every property interest that is "taken" in the process).

Mrs. Barr has legitimate property interests in her residence, and those interests cannot be simply assumed away by pretending that a § 7403 sale is the same as a consensual sale or a sale subsequent to a divorce decree. Supreme Court precedent demands that we protect Mrs. Barr's right to compensation for her property interests during the § 7403 process, something which the majority opinion fails to do. The weight of case law, both from this circuit and our sister circuits, is also strongly in favor of recognizing, and requiring compensation for, Mrs. Barr's survivor interest and right to prevent sale. Because the majority opinion fails to do either of these, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 09-1710

UNITED STATES OF AMERICA,
Plaintiff - Appellee,
v.

CAROLYN C. BARR,
Defendant - Appellant,
CHARLES J. BARR; COMERICA INCORPORATED;
CITY OF DETROIT AND COUNTY OF WAYNE,
Defendants.

Before: BATCHELDER, Chief Judge; ROGERS, Circuit Judge; GREER, District Judge.

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Michigan at Ann Arbor.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
Leonard Green, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff, Case No. 07-11717

v. Honorable John Corbett O'Meara

CHARLES J. BARR; *ET AL.*,

Defendants.

_____/

OPINION AND ORDER GRANTING PLAINTIFF'S MAY 30, 2008 MOTION FOR SUMMARY JUDGMENT

This matter came before the court on the United States' May 30, 2008 motion for summary judgment. Defendant Carolyn Barr ("Carolyn") filed a response June 13, 2008; and the government filed a reply brief June 20, 2008. Oral argument was heard July 31, 2008. For the reasons set forth below, the court will grant the government's motion.

BACKGROUND FACTS

The United States filed this civil action April 18, 2007, seeking the reduction to judgment of unpaid federal taxes assessed against Charles J. Barr ("Charles") and the foreclosure of the federal tax liens which arose from those assessments and attached to his property and rights to property. Having been satisfied in its first claim by the entry of a default judgment against Charles Barr in the amount of $324,438.88, plus interest from March 21, 2008, the United States now seeks judgment as a matter of law on its second claim. As to the foreclosure claim, only defendant Carolyn C. Barr, Charles Barr's wife, opposes the relief sought by the United States—foreclosure of the Barr home in the Palmer Woods District of Detroit ("the Cumberland Property").

LAW AND ANALYSIS

A federal tax lien is created by operation of law when a taxpayer refuses or neglects to pay a tax after payment is demanded. 26 U.S.C. § 6321. The lien extends to "all property and rights to property, whether real or personal, belonging to" such person. Id. "A federal tax lien is deemed to arise at the time that the assessment is made, even where the lien has not been recorded, and continues until the amount of liability set forth in the assessment is satisfied." United States v. Carlin, 948 F. Supp. 271, 278 (S.D.N.Y. 1996). Upon authorization of the Secretary of the Treasury, the United States may enforce the federal tax lien against the property of the taxpayer by filing suit in district court and seeking a judicial

order to sell that property and distribute the proceeds to the United States and such other claimants as may establish an interest in the property. 26 U.S.C. § 7403.[1]

"The threshold question . . . in all cases where the Federal Government asserts its tax lien, is whether and to what extent the taxpayer had property or rights to property to which the tax lien could attach." Blachy v. Butcher, 221 F.3d 896, 905 (6th Cir. 2000). Federal tax liens arising out of liabilities assessed against an individual taxpayer attach to that taxpayer's interest in property held in tenancy by the entireties, and those liens can be foreclosed even on entireties property. United States v. Craft, 535 U.S. 274, 287 (2002).

Under Michigan law, the 1974 warranty deed conveying the property at issue in this case created an ownership interest best characterized as a tenancy by the entireties. Butler v. Butler, 122 Mich. App. 361, 366 (1983). Defendant Carolyn Barr does not dispute the *Craft* rule that the federal tax liens arising out of assessments against Charles Barr attach to his interest in the Cumberland Property. She argues only that this court should assert its equitable discretion and decline to order the sale of the Cumberland Property solely to avoid causing her to relocate. See United States v. Rodgers, 461 U.S. 677, 709-12 (1983).

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[1]Pursuant to 26 U.S.C. § 6323(b), any property taxes owed to the City of Detroit and/or the Wayne County Treasurer have priority over liens of the United States of America arising out of federal tax liabilities assessed against defendant Charles Barr, and the relevant parties have so stipulated.

"Once a court determines that a delinquent taxpayer has an interest in property, and that a lien has attached, § 7403 requires the court to sell the property and distribute the proceeds, even if non-delinquent third parties retain an ownership interest or state law otherwise prohibits partition of the property." Wilson v. Wilson, 2002 WL 31545995 (E.D. Mich. 2002). "A court is afforded, however, a limited amount of equitable discretion in determining whether to force a sale of property where innocent third parties retain an ownership interest." Id.

In Rodgers, the Supreme Court held that foreclosure of federal tax liens that had attached to jointly owned property was appropriate under 26 U.S.C. § 7403, by sale of the entire property and distribution of the proceeds in proportion to the value of the interests of each owner. Rodgers, 461 U.S. at 697. "The use of the power granted by § 7403 is not the act of an ordinary creditor, but a sovereign prerogative, incident to the power to enforce the obligations of the delinquent taxpayer himself, and ultimately grounded in the constitutional mandate to lay and collect taxes." Id. The non-liable co-owner of foreclosed property, whose rights to the property were not encumbered by the federal tax lien, would be adequately compensated for any "taking" by an appropriate share of the net proceeds of the judicial sale of the property . Id. at 697-98.

However, "§ 7403 does not require a district court to authorize a forced sale under absolutely all circumstances . . . some limited room is left in the statute for the exercise of reasoned discretion." Id. at 706. "[T]he exercise of limited equitable discretion

can take into account both the Government's interest in prompt and certain collection of delinquent taxes and the possibility that innocent third parties will be *unduly harmed* by that effort." *Id.* at 709 (emphasis added). The Court emphasized that "the limited discretion accorded [a district court] under § 7403 should be exercised rigorously and sparingly, keeping in mind the Government's paramount interest in prompt and certain collection of delinquent taxes." Id. at 710.

Under Rodgers, the factors that a district court must consider before electing to order a sale include the following: 1) "the extent to which the Government's financial interest would be prejudiced if it were relegated to a forced sale of the partial interest actually liable for the delinquent taxes;" 2) "whether the third party with a non-liable separate interest in the property would, in the normal course of events (leaving aside § 7403 and eminent domain proceedings, of course), have a legally recognized expectation that separate property would not be subject to forced sale by the delinquent taxpayer or his or her creditors;" 3) "the likely prejudice to the third party, both in personal dislocation costs and in . . . practical undercompensation;" and 4) "the relative character and value of the non-liable and liable interests held in the property." Id. at 710-11. This is not an exhaustive list of the factors the court may consider, and it should not be used as a mechanical checklist.

As a joint owner of property arguing against foreclosure judgment, Carolyn Barr bears the burden of proof to show that under the Rodgers factors this

court should not order the foreclosure and the sale of the Cumberland Property. Rodgers supra, and United States v. Davenport, 106 F.3d 1333, 1338 (7th Cir. 1997).

First, the financial interest of the United States would be substantially prejudiced if sale of the entire property were denied and it were allowed to sell only Charles' interest in the property. Because the United States cannot look to any other assets of Charles to collect, the Cumberland Property is not amenable to partition; and it is unlikely that any purchaser could be found for only Charles' interest.

The government contends that if this court orders foreclosure, the United States would petition the court to appoint a local real estate broker as a receiver, who would list the Cumberland Property for sale on the open market, not through an auction. The government expects that the sales proceeds should approximate the fair market value of the property. After deduction of a five percent sales commission and closing costs, the net proceeds could be as much as $500,000. Charles' interest would entitle him to half of the sale proceeds. Since his assessed tax liabilities exceed the value of his share of the property, the United States would be entitled to his entire share. Thus, the first factor weighs in favor of foreclosure and sale.

The second factor also does not provide support for Carolyn's position. In the normal course of events, she could argue that her interest in the Cumberland Property would not be subject to a forced sale. However, such a legally recognized expectation of a

non-liable joint owner can be disturbed when that spouse "has acted with her husband in such a way as to frustrate the government's tax collection efforts." United States v. Bierbrauer, 936 F.2d 373, 376 (8th Cir. 1991). In this case Carolyn participated in the conveyance of four properties that were specifically contemplated to frustrate the United States' tax collection efforts. These were four properties in Saginaw, Michigan, that Charles' mother conveyed to Carolyn and not to Charles following the death of Charles' sister. Thus, Carolyn should not be permitted to engage in a shell game with the Saginaw properties to elude the very laws whose protection she now claims.

The third Rodgers factor does not weigh in favor of Carolyn. Although she argues that she would be prejudiced by having to move out of the Cumberland Property, there is no evidence that she would be *unduly harmed* by having to relocate or that her personal dislocation costs would be greater than in any other foreclosure against a residence to satisfy a tax lien. In Bierbrauer the court explained that if "the inherent indignity and inequity of being removed from one's home" automatically precluded foreclosure, "the government could never foreclose against a jointly owned residence—a result clearly untenable under § 7403." Bierbrauer, supra, at 375-76.

Carolyn Barr is 68 years old, is in good health, and sustains full-time employment. She claims no infirmity that would support a finding that relocation would unduly harm her. The inconvenience of her relocating is no different from the inconvenience associated with any foreclosure sale and is

insufficient to support a denial of such a sale in this case. In light of her substantial personal indebtedness and the expenses of maintaining the Cumberland Property, where monthly heating bills in the winter exceed $1000, perhaps cash in hand would be of greater benefit than judicial license to remain in the home.

Furthermore, Carolyn is guaranteed to receive her share of the proceeds of the sale of the Cumberland Property. Properties sold on behalf of the court routinely sell at or near fair market value. If it were to be sold at auction instead, she may be undercompensated for her interest in the property.

Finally, the fourth Rodgers factor, the relative character and value of the non-liable and liable interests held in the property, does not weigh in favor of this court exercising its limited discretion not to order sale of the entire property in this case. The Rodgers court was concerned with a situation in which the owner with the tax liability held only a small interest in the property and suggested that if the interest of the non-liable owner was worth 99% of the value of the property, there might be no reason to allow the sale of the entire property to proceed. This case, however, involves only two owners, husband and wife, each of whom holds an interest as tenants by the entireties that may be fairly divided between them.

Applying all the factors articulated in Rodgers, the court finds that foreclosure is warranted and that the government is entitled to summary judgment.

ORDER

It is hereby **ORDERED** that the government's May 30, 2008 motion for summary judgment is **GRANTED**.

s/John Corbett O'Meara
United States District Judge

Date: September 2, 2008

I hereby certify that a copy of the foregoing document was served upon the parties of record on this date, September 2, 2008, by electronic and/or ordinary mail.

s/William Barkholz
Case Manager

APPENDIX D

NO. 09-1710

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
v.	)	ORDER
	)	
CAROLYN C. BARR,	)	
	)	
Defendant-Appellant,	)	
	)	
CHARLES J. BARR, ET AL.,	)	
	)	
Defendants.	)	
	)	
	)	

BEFORE: BATCHELDER, Chief Judge; ROGERS, Circuit Judge; GREER,* District Judge.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the

petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
Leonard Green, Clerk

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*Hon. J. Ronnie Greer, United States District Judge for the Eastern District of Tennessee, sitting by designation.

FEB 14 2011

No. 10-794

In the Supreme Court of the United States

CAROLYN C. BARR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The United States is authorized by the Internal Revenue Code, 26 U.S.C. 7403, to foreclose the federal tax lien on property of a delinquent taxpayer, including property that the delinquent taxpayer co-owns with his non-liable spouse as tenants by the entirety. After a foreclosure sale, however, the non-liable spouse must be fairly compensated for her ownership interest in the property. In this case, the district court ordered a judicial sale of property that was co-owned by a delinquent taxpayer and by petitioner, his non-liable wife, as tenants by the entirety. The court awarded one half of the net proceeds from the sale to the United States to satisfy the taxpayer's unpaid taxes, and it awarded the other half to petitioner. The court of appeals affirmed. The question presented is as follows:

Whether the award of one half of the net sale proceeds fairly compensated petitioner for her interest in the property that she co-owned with her husband.

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In the Supreme Court of the United States

No. 10-794

CAROLYN C. BARR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 617 F.3d 370. The opinion of the district court (Pet. App. 24a-32a) is unreported but is available at 2008 WL 4104507.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 2010. A petition for rehearing was denied on September 14, 2010 (Pet. App. 33a-34a). The petition for a writ of certiorari was filed on December 13, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-2a.

STATEMENT

1. The United States brought this suit in the district court pursuant to 26 U.S.C. 7403 to reduce to judgment the delinquent federal tax liabilities of Charles J. Barr (taxpayer); to foreclose the federal tax lien on real property in Michigan that taxpayer and petitioner (taxpayer's non-liable wife) owned as tenants by the entirety; and to have the property sold at a judicial sale to pay the delinquent taxes from taxpayer's share of the net sale proceeds. Pet. App. 3a. The United States obtained a default judgment against taxpayer in the amount of the delinquent taxes, $324,438.88, plus interest from March 21, 2008. *Id.* at 25a. The United States then filed a motion for summary judgment on its remaining foreclosure and sale claims, which petitioner opposed. *Id.* at 3a-4a.

The district court granted summary judgment for the United States, holding that the government was entitled to foreclosure and sale of the property. The court ordered a judicial sale. See 5:07-cv-11717 Docket entry No. 41 (E.D. Mich. June 18, 2009). The court further ordered that one half of the net proceeds (after payment of sale expenses and undisputed superior claims) would be paid to the United States to satisfy its judgment for taxpayer's delinquent taxes, and that the other half would be paid to petitioner to compensate her for her interest in the property. Pet. App. 4a, 24a-32a.

2. The court of appeals affirmed. Pet. App. 1a-23a. On appeal, petitioner contended that a 50-50 division of the net sale proceeds violated her rights under the Just Compensation Clause because a one-half share was inadequate to compensate her for her interest in the entireties property. *Id.* at 4a-10a. Although petitioner and taxpayer are approximately the same age (born on

June 15, 1940, and September 17, 1940, respectively), petitioner relied on life expectancy tables issued by the Social Security Administration showing that she could be expected to outlive taxpayer by 2½ years. Docket entry No. 27, Exhs. B, ¶ 9; D; F; H, ¶ 1 (June 13, 2008). Petitioner claimed that her longer life expectancy gave her a survivorship interest in the property that was greater than taxpayer's, and that she should therefore be awarded the "vast majority of the sale proceeds." Pet. App. 3a. See Pet. C.A. Br. 36 (valuing petitioner's alleged interest at more than 93%).

The court of appeals rejected petitioner's argument. Pet. App. 3a-10a. The court observed that "[i]n determining property interests for federal tax law purposes, 'the definition of underlying property interests is left to state law,'" *id.* at 4a (quoting *United States* v. *Rodgers*, 461 U.S. 677, 683 (1983)), and that "spouses are entitled to equal interests in entireties property in every situation contemplated by Michigan law," *id.* at 5a. The court explained in particular that, under Michigan law, "[i]f property held by the entirety is sold, each spouse is entitled to half of the proceeds, and upon divorce, state law provides for a default equal division of such property." *Ibid.* The court observed that if the spouse with a longer life expectancy had a larger interest in entireties property under Michigan law, that greater interest would be reflected in the division of property upon divorce or a consensual sale. *Id.* at 7a. But because Michigan law provides for the equal division of property in those situations, the court explained, "differences in life expectancy do not result in different survivorship interests." *Ibid.* The court also noted that "[t]he Third Circuit has reached the same conclusion in" *Popky* v. *United States*, 419 F.3d 242, 245 (2005), where, after

noting that Pennsylvania's entireties law was analogous to Michigan's, the court held that each spouse had an equal share in a tenancy by the entirety and thus an equal interest in the proceeds of a sale of tax-encumbered property. Pet. App. 5a-6a.

Chief Judge Batchelder dissented. Pet. App. 14a-21a. She "disagree[d] with the majority opinion's conclusion that a [26 U.S.C.] § 7403 forced sale is equivalent to a divorce or consensual sale." *Id.* at 18a. Judge Batchelder would have held that, after the compelled judicial sale that took place in this case, an award of half of the net sale proceeds did not adequately compensate petitioner for her survivorship interest. *Id.* at 19a-21a.[1]

ARGUMENT

Petitioner contends (Pet. 17-30) that an equal division of the net proceeds from the foreclosure sale of property co-owned by petitioner and taxpayer as tenants by the entirety does not adequately compensate petitioner for her interest in the property. The decision of the court of appeals, however, is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. It is undisputed in this Court that a federal tax lien attached to taxpayer's interest in the property at issue, that the United States was entitled to foreclosure and sale of the property, and that petitioner was entitled to fair compensation from the sale proceeds for her interest. Under 26 U.S.C. 6321, the United States has a

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[1] The court of appeals unanimously rejected (Pet. App. 11a-16a) petitioner's argument that foreclosure should have been denied altogether pursuant to the district court's limited discretion to do so under *Rodgers*, 461 U.S. at 710-711. Petitioner does not seek review of that aspect of the court's decision.

lien on "all property and rights to property" of a taxpayer who neglects or refuses to pay his taxes after demand. In *United States* v. *Craft*, 535 U.S. 274 (2002), this Court held that the federal tax lien attaches to property in Michigan held by the entirety even if only one of the co-owning spouses is liable for the tax that gave rise to the lien. The Court reviewed the "bundle of sticks" that Michigan law conferred upon each tenant by the entirety, and it concluded as a matter of federal law that the "bundle" constituted property to which the federal tax lien attached. *Id.* at 278, 283-285. Based on the substantial rights of a Michigan tenant by the entirety and the broad language of the federal tax lien statute, this Court held that such a tenant "possesses individual rights in the estate sufficient to constitute 'property' or 'rights to property' for the purposes of the [tax] lien." *Id.* at 276.

Under 26 U.S.C. 7403(a), the United States is authorized to file a civil action in federal district court to enforce the federal tax lien upon property to which the lien has attached. In such an action, the district court is empowered to determine the merits of all claims to and liens upon the property, and to decree a sale of the property to satisfy an established claim of the United States. 26 U.S.C. 7403(c). In *United States* v. *Rodgers*, 461 U.S. 677, 690-702 (1983), the Court held that Section 7403 authorized the United States to seek foreclosure and sale of homestead property in Texas to enforce a lien for taxes owed by only one of the spouses, provided the nonliable spouse was fairly compensated from the sale proceeds for her interest in the property.

2. Although petitioner does not question the propriety of the forced judicial sale in this case, she contends that she is entitled to more than one half of the net sale

proceeds. Petitioner argues (Pet. 17-30) that because she has a longer life expectancy than her husband, the value of her survivorship interest in the property is greater than taxpayer's, and the division of the sale proceeds should reflect that greater value. The court of appeals' contrary decision is consistent with this Court's precedents, however, and with the only other appellate decision that has addressed this issue.

In *Craft*, this Court "express[ed] no view as to the proper valuation of respondent's husband's interest in the entireties property." 535 U.S. at 289. In the course of its opinion, however, this Court noted that "[r]espondent had no more interest in the property than her husband." *Id.* at 285. Indeed, as this Court explained, under Michigan law both cotenants in a tenancy by the entirety have precisely the same rights: the right to use the entire property; the right to exclude third parties from using it; the right to an equal share of the income produced from it; the right of survivorship; the right to become a tenant in common with equal shares upon divorce; the right to sell the property with the cotenant's consent and to receive one half of the proceeds upon such a sale; the right to place an encumbrance on the property with the cotenant's consent; and the right to block the cotenant from selling or encumbering the property unilaterally. *Id.* at 282; see Pet. App. 5a (noting that "spouses are entitled to equal interests in entireties property in every situation contemplated by Michigan law"); see also *Tkachik* v. *Mandeville*, 764 N.W.2d 318, 322-323 (Mich. App. 2009), rev'd on other grounds, 790 N.W.2d 260 (Mich. 2010), and cases cited therein.

After this Court's decision in *Craft*, the IRS issued a notice stating that "[a]s a general rule, the value of the

taxpayer's interest in entireties property will be deemed to be one-half." I.R.S. Notice 2003-60, 2003-2 C.B. 643. The Third Circuit also held that the value of a delinquent taxpayer's interest in a tenancy by the entirety is one half of the property's value. *Popky* v. *United States*, 419 F.3d 242, 245 (2005).

In *Popky*, the taxpayer and her husband sold property that they owned by the entirety under Pennsylvania law. After the sale, the title insurance company paid approximately $43,000 of the sale proceeds to the IRS to satisfy a federal tax lien that had been filed against the wife. 419 F.3d at 243. The Popkys filed a quiet title action to recover the amount paid to the IRS, contending that the federal tax lien did not attach to the wife's interest in property that she and her husband owned as tenants by the entirety. *Ibid.* After noting that "Pennsylvania's law of tenancy by the entiret[y] is materially similar to Michigan's," the Third Circuit relied on *Craft* in affirming the district court's decision that the federal tax lien attached to the wife's interest in the property. *Id.* at 244.

The Popkys also argued that the district court had erred in valuing the wife's interest at 50% of the property, and that the valuation should be based instead on the spouses' respective life expectancies. The Third Circuit rejected that contention. *Popky*, 419 F.3d at 244-245. The court held that "[v]aluing the interests of tenants by the entiret[y] equally accords with the long-standing Pennsylvania common law definition of tenancies by the entirety." *Id.* at 245. The Third Circuit also noted that a 50-50 division of the proceeds from a foreclosure sale is similar to the distribution of entireties property that occurs when the tenancy is severed by

reason of a consensual sale or a divorce.[2] *Ibid.* Finally, the Third Circuit stated that its result was supported by "sound policy" because an equal division of proceeds is "far simpler and less speculative" than the Popkys' proposed method. *Ibid.*

3. Petitioner contends (Pet. 17-30) that an equal division of the sale proceeds unfairly fails to acknowledge her greater survivorship interest in the entireties property, and that the court should have relied on actuarial life expectancy tables to determine the extent of her greater interest. Petitioner states (Pet. 18) that, by adopting an equal-division rule, the Third and Sixth Circuits have substituted judicial expediency for accuracy and just compensation. Petitioner fails to recognize, however, that reliance on actuarial tables is likewise nothing more than an "expedient" way to determine the value of two cotenants' interests, particularly in cases like this one, where the two spouses are the same age and their life expectancies differ by only 2½ years.

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[2] Like the Third Circuit, the court of appeals in this case reasoned that, because Michigan law mandates a 50-50 division of proceeds after a consensual sale of entireties property, the same division is appropriate in the forced-sale context presented here. See p. 3, *supra*. The dissenting judge would have held that a consensual sale and a forced sale should not be treated similarly because cotenants who consent to sale voluntarily "surrender[] their survivor interests." Pet. App. 21a. See also Pet. 21. As the court of appeals explained, however, the amount of compensation the government is required to pay after a taking of property does not turn on the willingness of the property owner to part with her interest. See Pet. App. 9a (explaining that, to satisfy Just Compensation Clause requirements, an "owner is entitled to receive what a willing buyer would pay in cash to a willing seller at the time of the taking") (quoting *Forest Indus., Inc.* v. *United States*, 467 U.S. 1, 10 (1984)).

As the district court recently recognized in *United States* v. *Barczyk*, 697 F. Supp. 2d 789, 799 (E.D. Mich. 2010), appeal pending, No. 10-1498 (6th Cir. Apr. 14, 2010), actuarial tables are intended to estimate life expectancy among groups of individuals. They are of limited value when applied to a particular individual. For example, "[t]he fact that men have a shorter life expectancy tells us very little about the chance of a particular husband predeceasing his wife, or vice-versa." *Ibid.* Resort to actuarial tables would plainly be unreliable if the cotenant with the longer life expectancy has been diagnosed with a terminal illness while the other cotenant is in good health, or if family history suggests that a particular individual has a longer or shorter life expectancy than the average person of his sex and age.

Moreover, the actuarial tables upon which petitioner relies do not take into account contingencies that would affect the value of her survivorship interest. Upon retirement, married couples often sell their homes in order to "downsize" their living quarters or to move to retirement communities. Married couples also frequently divorce. Either of these events—a consensual sale or a divorce—would result under Michigan law in an equal division of the sale proceeds or property. Because actuarial tables do not account for those common occurrences, they overstate the value of the survivorship interest of the spouse with the longer life expectancy.

Given the uncertainties inherent in relying on actuarial tables when attempting to value the survivorship interests of a particular husband and wife, it was not unreasonable for the Sixth Circuit here (and for the Third Circuit in *Popky*) to adopt a 50-50 division, at least in cases where the two cotenants are close in age. Perhaps recognizing the difficulty in placing a value on the sepa-

rate interests of cotenants of jointly owned property, this Court has declined to address the issue in its prior decisions. In *Rodgers*, this Court in dictum, and "*only for the sake of illustration*," gave as an example the valuation of a spouse's interest in homestead property (not entireties property) under Texas law by reference to actuarial tables. 461 U.S. at 698-699.[3] And in *Craft*, the Court expressly declined to address how the proper valuation of the taxpayer's interest in the entireties property was to be made. 535 U.S. at 289; see p. 6, *supra*. Since *Craft*, only two courts of appeals have decided the issue, and both have held that a 50-50 division was appropriate on the facts of the cases before them.

4. Petitioner describes a hypothetical scenario (Pet. 24-26) in which the husband is 89 years old and the wife 26, and she suggests that, if the husband was the sole delinquent taxpayer, a 50-50 division could not adequately compensate the wife for her interest in their entireties property. Contrary to petitioner's suggestion (Pet. 10), however, the court of appeals' decision in this case does not require that a 50-50 division be made in "every situation where a court is asked to order a sale of entireties property under [Section] 7403." Rather, the court simply concluded that petitioner had "present[ed] no compelling reason why this court should not apply the *presumption* of equal spousal life expectancy implicit in Michigan law." Pet. App. 8a (emphasis added). In *Barcyzk*, the district court noted that an equal division of proceeds upon divorce is simply the default rule under Michigan law, and that if the equities of a given case favor a different result, Michigan law permits the

[3] In its example in *Rodgers*, the Court hypothesized a non liable spouse who, unlike petitioner, had the sole present possessory interest in the property, together with one half of the survivorship interest.

courts to make such a division as is just and equitable. 697 F. Supp. 2d at 800. The court of appeals' decision thus does not foreclose the possibility that a different division of sale proceeds might be appropriate if the evidence suggested an extreme disparity between the respective life expectancies of the liable and non-liable cotenants.

5. Since this Court's decision in *Craft*, the only courts of appeals that have addressed the question presented here are the Third Circuit in *Popky* and the Sixth Circuit in this case.[4] Petitioner contends (Pet. 13), however, that the ruling below conflicts with pre-*Craft* decisions from four other circuits. Petitioner's reliance on those decisions is misplaced.

In re Pletz, 221 F.3d 1114 (9th Cir. 2000), involved the valuation, for bankruptcy purposes, of a taxpayer-debtor's interest in property owned by the entirety under Oregon law. The bankruptcy court relied on joint-life expectancy tables and valued the debtor's interest at

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[4] Since *Craft*, most district courts and bankruptcy courts have adopted a 50-50 valuation approach in resolving the question presented here. See *Barczyk*, 697 F. Supp. 2d at 797-800; *United States* v. *Tolbert*, Civil No. 06-5146, 2007 WL 2710432, at *5 (W.D. Ark. Sept. 13, 2007), aff'd, 326 Fed. Appx. 412 (8th Cir. 2009); *United States* v. *Ryan*, No. 04-0531-CV-W-GAF, 2005 WL 6153137, at *2-3 (W.D. Mo. July 19, 2005); *In re Gallivan*, 312 B.R. 662, 664-665 (Bankr. W.D. Mo. 2004); *In re Spears*, 308 B.R. 793, 821 (Bankr. W.D. Mich. 2004), rev'd on other grounds, 313 B.R. 212 (W.D. Mich. 2004). On two occasions, bankruptcy courts have followed a joint-life expectancy approach to the valuation of the spouses' respective interests. See *In re Murray*, 318 B.R. 211, 214 (Bankr. M.D. Fla. 2004); *In re Basher*, 291 B.R. 357, 364 (Bankr. E.D. Pa. 2003). *In re Basher*, however, involved Pennsylvania entireties property and is no longer good law after *Popky*. In any event, as petitioner acknowledges (Pet. 15), a conflict among the district courts and bankruptcy courts does not provide an appropriate basis for review by this Court.

46.793% and the non-debtor spouse's interest at 53.207%. *Id.* at 1116. The government did not contest the court's reliance on those tables. The debtor appealed, however, arguing that his interest should be valued using single-life expectancy tables. *Id.* at 1117-1118. In rejecting that argument, the Ninth Circuit noted that such an approach would result in the spouses' combined interests totaling more than 100%, and it held that the sum of the spouses' concurrent interests in entireties property "must equal 100% of the value of the Property." *Id.* at 1118.[5]

Harris v. *United States*, 764 F.2d 1126 (5th Cir. 1985), and *United States* v. *Molina*, 764 F.2d 1132 (5th Cir. 1985), involved homestead properties in Texas that were encumbered by a lien for the federal tax indebtedness of one spouse. In those cases, the Fifth Circuit held that the spouses' concurrent ownership of the homestead required the use of joint-life, rather than single-life, tables to value their respective shares. *Id.* at 1131, 1133. Because neither the Fifth Circuit in those cases nor the Ninth Circuit in *Pletz* was asked to decide whether a 50-50 division of entireties property was appropriate, the court of appeals' decision in this case does not conflict with those rulings.

The decision in *United States* v. *Gibbons*, 71 F.3d 1496 (10th Cir. 1995), is further afield. In *Gibbons*, a

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[5] Petitioner argued in the court of appeals that her interest in the entireties property exceeded 93%, and that it was of no import that, under her valuation method, the combined interests owned by petitioner and taxpayer would exceed 100%. See Pet. C.A. Br. 36-37. The Sixth Circuit rejected petitioner's argument (Pet. App. 10a) under reasoning similar to that in *Pletz*, explaining that the sum of the two spouses' interests could not exceed the whole of the property to be distributed upon foreclosure.

separation agreement severed a joint tenancy (not a tenancy by the entirety), and under the agreement the spouse who was liable for the federal taxes no longer had a life estate in the property. *Id.* at 1500. The Tenth Circuit held only that, because the separation agreement conveyed ownership of both the sole life estate and a one-half remainder interest to the non-liable spouse, "she ha[d] more than a one-half interest in the property." *Ibid.* *Gibbons* is not inconsistent with the decision of the court of appeals here.

Finally, in *United States* v. *Baran*, 996 F.2d 25 (2d Cir. 1993), the Second Circuit held that an individual life estate encumbered by a federal tax lien is valued by reference to actuarial tables. *Id.* at 28. That holding simply gives effect to the fact that the entire value of the property in which the life estate is held must be reduced by the value of the remainder interest. Nothing in *Baran* supports petitioner's view that resort must be made to actuarial tables in every case to determine the value of the non-liable spouse's interest in entireties property.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

1. 26 U.S.C. 6321 provides:

Lien for taxes

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

2. 26 U.S.C. 7403 provides:

Action to enforce lien or to subject property to payment of tax

(a) Filing

In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability. For purposes of the preceding sentence, any acceleration of payment under section 6166(g) shall be treated as a neglect to pay tax.

(b) Parties

All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.

(c) Adjudication and decree

The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property, by the proper officer of the court, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States. If the property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of such lien with expenses of sale, as the Secretary directs.

(d) Receivership

In any such proceeding, at the instance of the United States, the court may appoint a receiver to enforce the lien, or, upon certification by the Secretary during the pendency of such proceedings that it is in the public interest, may appoint a receiver with all the powers of a receiver in equity.

No. 10-794

In the Supreme Court of the United States

CAROLYN C. BARR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The government's brief in opposition does not dispute that the question presented is recurring, nationally important, and squarely at issue in this case. Rather, the government devotes its attention primarily to a preemptive defense of the merits of a 50/50 rule and (eventually) to asserting that the dissenting judge below, commentators, and various lower courts are all mistaken in acknowledging the deep and entrenched conflict on this issue. But saying so does not make it so.

As explained below, the circuits (not to mention district and bankruptcy courts) are in square and persistent disagreement over whether § 7403 requires district courts to value spousal entireties interests by a strict 50/50 rule. The government's contrary claim rests on a series of flawed premises—*e.g.*, that *Craft* simultaneously changed nothing and yet changed everything and that § 7403 permits deviation from the normal actuarial valuation of assets such as a joint life estate or a survivorship interest by relying on a 50/50 rule when those assets are part of an entireties estate.

The government is also wrong in claiming that the 50/50 rule is the correct method of valuation. The government simply ignores the majority of petitioner's arguments, offering instead the bizarre contention that the imprecision inevitable in any estimation of life expectancy warrants making no attempt to estimate whatsoever. And, tellingly, the government offers no explanation for sharply reversing the position it previously took before this

Court and at least two lower courts. Indeed, the enduring conflict in the lower courts is in part the government's own making. This Court's review is needed to resolve it.

I. The Conflict Is Real And Widespread

As the petition explained, Pet. 10-14--and as Chief Judge Batchelder expressly noted below without disagreement from the panel majority—the lower courts are deeply divided about how to value an innocent spouse's component interests in a tenancy by the entirety for purposes of 26 U.S.C. § 7403. Accord Kimberly A. Butlak, *When Is a Tenancy by the Entirety Interest in Common Law Jurisdictions an Asset of One Spouse? Craft-ing a Solution for the Tax Code's § 108 Insolvency Exclusion*, 34 U. Balt. L. Rev. 287, 303 (2005) ("[C]ourts are split regarding whether the value of one spouse's interest in tenancy by the entirety property should be adjusted further to account for each spouse's separate survivorship interest in cases concerning a debtor's federal tax obligation."). The government offers three arguments claiming that there is no conflict warranting this Court's review. None has merit.

A. The government notes that the four circuit-level cases adopting petitioner's position pre-date this Court's decision in *United States* v. *Craft*, 535 U.S. 274 (2002). Br. in Opp. 11. That is true but irrelevant. As the government elsewhere acknowledges, *Craft* identified but *"express[ed] no view"* on the very question at issue in this case—*i.e.* "the proper *valuation* of" a delinquent taxpayer's interest in property held in tenancy by the entirety. *Id.* at 6 (quoting 535 U.S. at 289) (emphasis added). In addition, neither of the post-*Craft* circuit-level

decisions that adopted the government's current position perceived *Craft* as controlling on the issue. To the contrary, those decisions recognized that *Craft* "*left open* the question of how to value the respective tenants' interests in entireties property in these circumstances." *Popky* v. *United States*, 419 F.3d 242, 244-245 (3d Cir. 2005) (emphasis added); accord Pet. App. 5a-13a.

B. The government notes that the Second, Fifth, and Tenth Circuit decisions cited in the petition did not involve entireties property. Br. in Opp. 12-13. That is likewise true—petitioner expressly acknowledged as much in the petition, see, *e.g.*, Pet. 10 (describing conflict as over valuation of "component interests" contained in entireties property); *id.* at 13 (describing the majority of "circuits [as having] approved the use of actuarial calculations to value *the individual interests that make up a tenancy by the entirety*") (emphasis added)—but equally irrelevant. As this Court explained in *Craft*, the discrete rights granted by a tenancy by the entirety can be analogized to a "bundle of sticks," 535 U.S. at 278, including a joint-life estate and a survivorship interest, *id.* at 282. Accordingly, one cannot assign a value to a spouse's total interest in an entireties property without assigning a value to those constituent parts. Accord Transcript of Oral Argument at 15, *United States* v. *Craft*, 535 U.S. 274 (2002) (No. 00-1831) (counsel for the United States observing that a court should value a taxpayer's interest in an entireties estate by treating each spouse "as if they have a life estate plus a right of survivorship"). If joint-life estates and survivorship interests must ordinarily be valued actuarially—and the government does not dispute

that three circuits have so held—it follows that the valuation rule for these same interests in an entireties property cannot be 50/50. That is why the government points to no case in any of those circuits suggesting that a 50/50 rule for entireties property (or for other property including a joint-life estate and survivorship interest) would be permissible. And district courts certainly understand that these circuits would not follow the 50/50 rule in valuing component entireties interests. See, *e.g.*, *United States* v. *Barczyk*, 697 F. Supp. 2d 789, 799 (E.D. Mich. 2010).

C. The government acknowledges that *Pletz* v. *United States*, 221 F.3d 1114 (9th Cir. 2000), *did* involve a proper method of valuing "a taxpayer-debtor's interest in property owned by the entirety" and that the Ninth Circuit there adopted an actuarial valuation, *not* the 50/50 approach endorsed by the Sixth Circuit in this case. Br. in Opp. 11-12. No matter, says the government, because "the Ninth Circuit in *Pletz* was [not] asked to decide whether a 50-50 division of entireties property was appropriate." *Id.* at 12. That is true but only because *the government itself* argued in favor of actuarial valuation in *Pletz*. As the government explained in that case, "a joint-life actuarial table appropriately and properly values the tenants by the entirety interest in real property," Gov't C.A. Br. at 19, *Pletz* v. *United States*, 221 F.3d 1114 (9th Cir. 2000) (No. 99-35248), and, thus, "[t]he bankruptcy court properly used the joint-life actuarial tables to value the respective interests of the debtor and his nondebtor wife," *id.* at 21; see also *id.* at 5 (noting that the IRS had "presented evidence in the form of an actuarial determination" based on the ages of the

debtor and his wife and that its calculation of the value of the debtor's interest "was based on joint-life actuarial tables to account for the interests of both of the spouses").[1] Yet again, the government does not point to a case within the Ninth Circuit suggesting that the actuarial rule adopted in *Pletz* is anything less than the definitive word on the subject.

II. The Government Offers No Explanation For Its Reversal Of Position, Which Is Wrong On The Merits

The government devotes most of its efforts to defending the virtues of a 50/50 rule, but it largely fails to confront petitioner's arguments. And the government makes no effort to explain its sharp reversal of the position it took before this Court less than a decade ago (and, as noted above, pp. 4-5 & n.1, *supra*, in *Pletz* and *Harris*). See Pet. 27-28 (explaining that the government argued for an actuarial method of valuing an entireties property in both its briefing and oral argument in *Craft*).[2]

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[1] The government has made the same argument elsewhere. See Gov't C.A. Br. at 12-13, *Harris* v. *United States*, 764 F.2d 1126 (5th Cir. 1985) (No. 84-1703) (arguing for actuarial valuation of a right of survivorship and offering Treasury Department tables for that purpose). In fact, in *Popky*, the Third Circuit case first adopting the 50/50 rule, the government itself originally "urged [in the alternative that] the district court * * * value the spouses' interests in property based on their relative life expectancies." Gov't C.A. Br. at 6, *United States* v. *Popky*, 419 F.3d 242 (3d Cir. 2005) (No. 04-2798), available at 2004 WL 5040670.

[2] The only glimmer of an explanation is the government's brief mention of a 2003 IRS notice stating that "[a]s a general rule, the value of the taxpayer's interest in entireties property will be

A. The government first argues that the court of appeals' 50/50 rule is "consistent with this Court's precedents" because *Craft* described entireties owners as having the same "interest" in the entireties property. Br. in Opp. 6. As explained in the petition, however, that argument confuses the *definition* of an entireties interest with the *value* of such an interest. See Pet. 18-19. Just because the definition of each spouse's interests in entireties property is the same does not mean that those identical interests will have identical cash values. Some components of the entireties interest, such as the right of survivorship, will almost always *not* have equal value to both spouses because their value to each spouse necessarily turns on the probability that that spouse will outlive the other. Pet. 19. The government offers no response to this point.

B. The government also suggests that the 50/50 rule is superior to actuarial valuation because actuarial tables are "intended to estimate life expectancies among groups of individuals [and] are of limited value when applied to a particular individual." Br. in Opp. 9. Of course, actuarial tables are not *perfect* predictors of a specific person's life expectancy because they rely on group characteristics

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deemed to be one-half." Br. in Opp. 6-7 (quoting I.R.S. Notice 2003-60, 2003-2 C.B. 643). The government offers no explanation of how the IRS reached this conclusion, however. And it rightly does not claim that the notice is entitled to any sort of deference. See *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000); *United States* v. *Barczyk*, 697 F. Supp. 2d 789, 797 n.2 (E.D. Mich. 2010). Neither of the courts of appeals that have agreed with the government's position—the Third Circuit in *Popky* and the Sixth Circuit in this case—relied on, or even cited, the 2003 notice.

as the basis for their prediction. But in the context of valuing property rights, actuarial tables are frequently used—and sometimes required to be used—to predict how long *individuals* will live. That, in fact, is why the Treasury Department makes them available for use in those circumstances. See *United States* v. *Rodgers*, 461 U.S. 677, 704 (1983) (noting that "any calculation of the cash value of a homestead interest must of necessity be based on actuarial statistics" even though this method "will unavoidably undercompensate persons who end up living longer than the average"); *Harris*, 764 F.2d at 1130-1131 (finding "no reason here to depart from the use of the Treasury tables in determining the value of" the nondebtor's interest notwithstanding her argument "that a question of fact exists as to which actuarial table appropriately measures her life expectancy"); *id.* at 1131 (holding that use of actuarial tables "in determining the present value of future interests in property has long been recognized and approved by the Supreme Court") (citing *Simpson* v. *United States*, 252 U.S. 547, 550 (1920)).

Despite any shortcomings, actuarial tables are vastly better predictors of a lifespan than a presumption that any two married owners of entireties property will live precisely the same length of time regardless of their respective ages and sexes. By criticizing the imperfections of an actuarial approach without acknowledging the far greater ones inherent in a rigid 50/50 split, the government would have this Court make the perfect the enemy of the obviously better. Put another way, the government does not dispute that § 7403 directs courts to award the innocent spouse the actual cash value of that spouse's interest in the marital home. But it would

be beyond strange to read that command as requiring a blind guess as to the correct value of that interest rather than a thoroughly educated one.[3]

C. Although the government parrots the Third Circuit's observation that the 50/50 approach is "far simpler" to administer, Br. in Opp. 8 (quoting *Popky*, 419 F.3d at 245), it does not argue that actuarial valuation would be unduly complex or burdensome for the lower courts. Such an argument would fail in any event. As the government explained in its briefing to this Court in *Craft*,

> [t]he necessity of resolving these issues is simply one of the "practical consequences" of the failure of one of the joint owners to pay taxes as they come due. These "practical consequences" have not prevented the prompt and efficient application and enforcement of the federal tax lien to every *other* type of jointly-owned property.

U.S. Reply Br. at 18, *United States* v. *Craft*, 535 U.S. 274 (2002) (No. 00-1831) (quoting *United States* v. *Rodgers*, 461 U.S. 677, 698 (1983)). Besides, courts

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[3] The government errs in suggesting that the 50/50 rule adopted by the Third and Sixth Circuits is simply a "presumption" that can be discarded if it proves sufficiently inaccurate or unjust in a particular case. Br. in Opp. 10-11. Neither court described its holding in this way. See *Popky*, 419 F.3d at 245 (Third Circuit "reject[s]" the "approach" of looking to actuarial tables); Pet. App. 7a-8a. In particular, when read with the slightest attention to context, the Sixth Circuit's reference to "the presumption of equal spousal life expectancy implicit in Michigan law," Pet. App. 8a, refers not to a *particular* spouse's ability to persuade a court that an actuarial approach is warranted in a specific case but to petitioner's failure to persuade the court that an actuarial approach is *ever* appropriate in valuing property held in a tenancy by the entireties.

routinely value property rights far more complicated than this.

D. The government offers no response to petitioner's remaining arguments. In particular, the government does not deny that a 50/50 approach can dramatically undervalue an innocent spouse's interests in entireties property by (1) misallocating value between the joint-life estate and the remainder; (2) incorrectly valuing the remainder interest for the longer-living spouse; and (3) ignoring the value to that spouse of the right to prevent unilateral alienation. See Pet. 22-23. The government does not dispute that federal tax law *requires* that several of the component interests that make up an entireties property be valued actuarially. See *id.* at 23-24; see also *Simpson* v. *United States*, 252 U.S. 547, 550-551 (1920) (approving an actuarial approach for "determining the present value of future contingent interests in property" under the tax code and stating that "[i]t is much too late to successfully assail a method so generally applied"). The government likewise does not deny that the *IRS itself* often requires that spouses actuarially value their separate interests in entireties property when paying gift taxes. See Pet. 28. Nor does it take issue with petitioner's explanation of why the court of appeals' failure to accord *any* value to Mrs. Barr's ability to prevent Mr. Barr from selling the home in which she is entitled to live for the rest of her life is inconsistent with Treasury Department regulations that govern the same issue in the gift tax context. See *id.* at 29-30.

III. The Government Does Not Deny That This Issue Is Recurring And Important Or That This Case Is An Ideal Vehicle For Resolving It

A. The government does not dispute that the issue presented in this case is of great importance to the 67.5 million married Americans who live in States that recognize tenancy by the entirety, see Pet. 30, and to the 52.7 million married Americans who live in States that recognize other forms of joint ownership, see *id.* at 31-32. Nor does the government deny that the method for valuing entireties interests "has become one of the most frequently litigated federal tax questions," see *id.* at 30, or that current economic conditions make the need for this Court's review even more pressing, see *id.* at 34. Finally, the government does not deny that "[t]he severely strained financial resources of many delinquent taxpayers and their spouses make it impractical for many to seek full judicial review," *id.* at 33, meaning that this case "presents an uncommon opportunity for this Court to resolve" an important and recurring question, *id.* at 16.

B. The government identifies no vehicle defect and none exists. The case presents a clear issue of pure law, whether 26 U.S.C. § 7403 permits a 50/50 rule or requires an actuarial valuation. There are no threshold issues. The issue is squarely presented, and its resolution will directly impact the outcome of this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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